[redacted]

SUPREME COURT OF THE UNITED STATES

[redacted]

No. 880

[redacted]

CHARLES W. DALE, EDWARD BOTT, AND HENRY [redacted]
TRUSTEES IN BANKRUPTCY OF DAVID [redacted]
BANKRUPT, APPELLANTS,

v.

EDWARD M. PATTISON.

[redacted]

[redacted]

(23,333)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 330.

CHARLES W. DALE, EDWARD ROTT, AND HENRY AMPT, TRUSTEES IN BANKRUPTCY OF DAVID ROHRER, BANKRUPT, APPELLANTS,

vs.

EDWARD M. PATTISON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1914.

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a United States Circuit Court of Appeals, Sixth Circuit.

No. 2172.

EDWARD M. PATTISON, Petitioner and Appellant,

vs.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Respondents and Appellees.

Petition to Review, and Appeal from, an Order of the District Court of the United States for the Southern District of Ohio.

Record.

Petiton for Review Filed April 11, 1911; Transcript on Appeal Filed May 1, 1911.

Filed Jul- 12, 1911. Frank O. Loveland, Clerk.

1 *Transcript of Record.*

United States Circuit Court of Appeals for the Sixth Circuit.

No. —.

In the Matter of DAVID ROHRER, a Bankrupt.

Petition of Edward M. Pattison for Review.

The petition of Edward M. Pattison, a creditor of David Rohrer, bankrupt herein, respectfully shows to this court that on the 5th day of November, 1909, the said David Rohrer, filed his petition in the District Court of the United States for the Southern District of Ohio, Western Division, praying therein that he should be adjudged a bankrupt, and that afterwards on the 15th day of November, 1909, he was by the judgment of said court duly adjudged a bankrupt, and on the 15th day of November, 1909, said District Court of the United States referred the estate of said Bankrupt to Honorable W. S. McConnaughey, Referee, for said court, and that one of the purposes of said reference was that said Referee receive claims against said bankrupt estate and allow or disallow the same and pass upon the secured and preferred claims, and also settle and determine the title to said assets and personal property as between the Trustees of the bankrupt estate and any other person or persons claiming title to or an interest in the same or any part thereof.

That on the — day of November, 1909, Charles W. Dale, Edward Rott and Henry Ampt, were duly appointed and qualified as Trustees of the estate of said David Rohrer, a bankrupt.

That afterwards on the 30th day of December, 1909, said Trustee filed in said District Court with said Referee, a petition, called an application, a copy of which is hereto attached and made part hereof marked Exhibit No. 1.

And your Petitioner Edward M. Pattison, having been duly served with notice of the filing of said petition or application, afterwards on the 18th day of January, 1910, filed his certain Answer and Intervening Petition to the said Petition of the Trustees, a copy of which is attached to and made part hereof marked Exhibit No. 2.

That afterwards, on the 15th day of April, 1910, your petitioner filed an amendment to his said Answer and Intervening Petition, a copy of which is attached to and made part hereof marked Exhibit No. 3.

2 That the said Trustees on the 26th day of March, 1910, filed a demurrer to the Answer and Intervening Petition of your Petitioner, which was by an order made by said Referee and by consent of parties, taken as a demurrer to said Answer and Intervening Petition of said Edward M. Pattison and the amendment thereto, a copy of which demurrer is attached to and made a part hereof marked Exhibit No. 4.

That afterwards, said Referee rendered a judgment on said Demurrer, a copy of which is attached hereto and made part hereof marked Exhibit No. 5.

That your petitioner thereupon filed a petition for a review of the order and judgment entered by said Referee on said demurrer, a copy of which with the certificate of the referee and the question certified therein is hereto attached and made part hereof marked Exhibit No. 6.

That afterwards, said District Court, did on the 11th day of April, 1911, enter a certain order and judgment on said petition for review, a copy of which is hereto attached and made part hereof marked Exhibit No. 7.

Your petitioner further shows that the question of law involved in the decision of the District Court was whether under the circumstances set forth in the answer and intervening petition and the amendment thereto, filed by your petitioner, the Trustees in Bankruptcy, as to the property in controversy herein and described in the intervening petition in this case and the Exhibits thereto, took the same subject to the equities impressed upon it in the hands of the bankrupt and had no greater rights or equities therein than the bankrupt had.

That as the Trustees in Bankruptcy of David Rohrer in their application or petition herein, are not seeking to enforce against the property described in the intervening petition herein and the exhibits thereto, the specific lien of any creditor or creditors, they stand in no better plight or condition with reference to said property than said bankrupt did prior to his bankruptcy.

Your petitioner further shows that the question of law decided by the District Court, was that under the circumstances set forth in the answer and intervening petition and exhibits aforesaid and amendment thereto filed by your petitioner, that the Trustees in Bankruptcy of the said David Rohrer took the property described

in said Exhibits, free and discharged of any liens, rights, or claims which existed in favor of your petitioner thereto, prior to the commencement of the proceedings and adjudication of said David Rohrer as a bankrupt.

3 Your petitioner further shows that he is aggrieved by the orders of said District Court and injured thereby, and that the errors complained of consist—

First. In the judgment of said District Court confirming the order and judgment entered by the said W. S. McConnaughey, Referee.

Second. In adjudging and decreeing that the property claimed by your petitioner should be sold by the Trustees in Bankruptcy free and discharged of all claims of your Petitioner in accordance with the decree and judgment of said Referee.

Third. In refusing to give to the contracts set forth and attached to the answer and intervening petition of your Petitioner their proper legal effect.

Fourth. In confirming the order and judgment of the said W. S. McConnaughey, Referee, and refusing to set aside and reverse the same.

Fifth. Your Petitioner therefore saks for an early hearing of this matter, and that the same may be presented upon the petition and exhibits filed herewith, or if your Honors so direct, upon the original pleadings and proceedings now on file in the office of the Clerk of the United States District Court, where said proceedings were had.

Wherefore, your petition- prays that the order of said District Court may be reviewed and revised in matters of law so as to adjudge that your petition- is entitled to the property set forth in said answer and intervening petition as amended, with the right to dispose of the same for the payment of the debts due him, and for his costs and for all other proper equitable relief.

EDWARD M. PATTISON,
HEALY, FERRIS & McAVOY,
His Attorneys.

W. H. MACKOY,
ROBERTSON & BUCHWALTER,
JAS. E. ROBINSON,
JACKSON W. SPARROW,
H. L. GORDON,
YOUNG & YOUNG,
E. HEIDINGSFELD,
WALTER A. RYAN,
Of Counsel.

4 EXHIBIT No. 1.

In the District Court of the United States in and for the Southern District of Ohio, Western Division.

No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

Application.

To the Honorable A. C. Thompson, District Judge:

And now comes Charles W. Dale, Edward Rott, and Henry Ampt, Trustees of David Rohrer, having been heretofore elected and qualified, and now acting as such Trustees, and respectfully represent and show to the Court,

First. That for many years prior to the filing of the petition herein for the adjudication of the said David Rohrer, a bankrupt, the said David Rohrer had been engaged in the business of distilling of Bourbon and Rye Whiskies at his distillery located near the village of Germantown, Montgomery County, Ohio, and that as a part of his plant and distillery he had in connection therewith, at the time of his adjudication, four separate buildings in which he stored the said whiskey as it was manufactured.

Second. That he stored said whiskey, as made in said buildings for the purpose of improving it by age, and until he sold and disposed of same, and until the tax thereon, levied by the Government, was paid.

Third. That said buildings were not used for the storage of any whiskies other than the whiskies manufactured by said David Rohrer, nor other merchandise or thing, the property of said David Rohrer, or of any other person.

Fourth. That at the time of the filing of the petition for the adjudication of said David Rohrer, a bankrupt, and at the time of the appointment and qualification of these Trustees, there were stored in three of the four buildings used for storage purposes, 9,849 barrels of bourbon and rye whiskies, which, before that time, from time to time, as made, had been placed therein for the purposes aforesaid, and that said whiskies passed to said Trustees upon their appointment and into their possession, and they now hold same, except thirty-two barrels of rye whiskey, sold by the Receiver herein, under order of this Court. A full and detailed statement of said barrels, the date of manufacture, and the serial numbers of the barrels or packages are shown in exhibits hereto attached marked Exhibit- "A" and "B."

Fifth. That the following named persons, with their places of residence, respectively, claim to have some interests in parts
5 and parcels of said whiskies, claiming to have bought same. The number of barrels so claimed to have been bought, with

the serial numbers of the barrels, are given in said Exhibit "A" hereto attached.

The name and residences of said parties are as follows:

The Weidemann Company, Cleveland, Ohio.
Wm. C. Biles Company, Cincinnati, Ohio.
Frank Mueller, Middletown, Ohio.
J. G. Mader & Sons, Bucyrus, Ohio.
Otto Wagner & Bro., Tiffin, Ohio.
The Hossfeld & Son Company, Hamilton, Ohio.
Hugh McIlvain, Cincinnati, Ohio.
Detrick Distilling Company, Tippecanoe City, Ohio.
Republic Distributing Company, Cincinnati, Ohio.
Geo. F. Baker, Dayton, Ohio.
Beech Hill Dist. Company, Cincinnati, Ohio.
The Frank G. Tulledge Company, Cincinnati, Ohio.
Jos. Silverman & Company, Cincinnati, Ohio.
The Oneal Parker Company, Covington, Ky.
The National Dist. Company, Cincinnati, Ohio.
Virginia Carolina Grocery Company, Richmond, Va.
Geo. M. Graves & Sons, Dayton, Ohio.
The Geo. Biles Company, Cincinnati, Ohio.
Chas. W. Sander, Dayton, Ohio.
Ulman Emstein Company, Cleveland, Ohio.
Nexter & Company, Memphis, Tenn.
The Albert M. Gugenheim Company, Cincinnati, Ohio.
Fred Kette Sons Company, Dayton, Ohio.
Dayton Club, Dayton, Ohio.
Louis Poock, Cincinnati, Ohio.
L. Weiskopf, Cincinnati, Ohio.
Turner Dist. Company, Cincinnati, Ohio
Richard & Company, Washington, D. C.
Schauer Dist. Company, Dayton, Ohio.
Sol. Rauh & Sons Company, Dayton, Ohio.
T. F. Creighton, Manitou, Colo.
Max Fruhauf Company, Cincinnati, Ohio.
S. N. Weil & Company, Cincinnati, Ohio.
C. Sandheger Company, Cincinnati, Ohio.
The Weidemann Company, Cleveland, Ohio.
M. Durner & Company, Cincinnati, Ohio.
Mountain Dist. Company, Cincinnati, Ohio.
William C. Biles Company, Cincinnati, Ohio.
Weideman Freis Company, Cleveland, Ohio.
The John Deis Company, Dayton, Ohio.
Hulman & Company, Terre Haute, Ind.
C. Sunstein & Sons, Pittsburgh, Pa.
M. Dernham & Sons, Cincinnati, Ohio.
6 Peter Weber & Company, Middletown, Ohio.
I. Trager & Company, Cincinnati, Ohio.
S. T. Patterson, Dayton, Ohio.

Sixth. That the following persons, with the places of residence of each, respectively, claim to have bought of some of the above named parties parts of their respective holdings.

Their names and residences are as follows:
J. and A. Freiberg, Cincinnati, Ohio.
Max Ehrman, Chicago, Ill.
The J. W. Biles Company, Cincinnati, Ohio.
John W. Cherry, Danville, Ill.
C. F. Weckesser, Mt. Vernon, Ind.
The Theobald & Son Company, Columbus, Ohio.
Harry F. Whitney, Cincinnati, Ohio.
Bernheim Rextinger & Company, Cincinnati, Ohio.
Harry F. Hopkins, Cincinnati, Ohio.
Peter Borntrager, Miamisburg, Ohio.
Thos. A. Sullivan, 122-124 Pearl St., Cincinnati, Ohio.
Fred C. Olt, Dayton, Ohio.
Charles E. Becker, Phillipsburg, Ohio.
George H. Goodman & Co., Cairo, Ill.
F. A. Weymouth, Huntington, W. Va.
Charles Schmidt, Milan, Mich.
John Winkelman, Ottoville, Ohio.
S. M. Beck, Miamisburg, Ohio.
Theodore Young, Miamisburg, Ohio.
August Kothman, Burkettsville, Ohio.
J. C. Hansen, Dayton, Ohio.
Mike Kastl, Dayton, Ohio.
George Kinzler & Co., Dayton, Ohio.
Bott & Cannon Co., Columbus, Ohio.
J. J. Hittemiller, Dyersville, Iowa.
Sam. Hemple, Lorain, Ohio.
Ben. Vogelsong, Loramie, Ohio.
Wm. Neubrander, Excello, Ohio.
E. A. Bergman & Co., Chicago, Ill.
W. E. Wahler, Deshler, Ohio.
Ernest Oetterer, Middletown, Ohio.
Joseph G. Bachman, Akron, Ohio.
Lung, Schenck & Co., Columbus, Ohio.
Frank Baumgartner, Galion, Ohio.
T. C. McCarthy, Denison, Iowa.
Curl Waltersdorf, Creston, Iowa.
J. A. Blake, Huntington, W. Va.
Julius Bachman, Middletown, Ohio.
Sheets & Bush, Botkins, Ohio.
J. A. Berticci, Richmond, Va.
7 Meadows and Swan, Huntington, W. Va.
N. P. Seeger, Middletown, Ohio.
E. C. Braun, Cincinnati, Ohio.
Cal. Tucker, Cincinnati, Ohio.
Nick Nelson, Sioux City, Iowa.
Lipman & Co., Cincinnati, Ohio.
Moriconi & Corrieri, Richmond, Va.
William J. Barry, Middletown, Ohio.
Cooperative Distilling Co., Cincinnati, Ohio.
Mary Theurkauf, Cincinnati, Ohio.
Robert McLain, Middletown, Ohio.

George Lubberger, Middletown, Ohio.
J. Munch & Son, Toledo, Ohio.
Marchetti & Grovannetti, Richmond, Va.
M. E. Temmen, Middletown, Ohio.
C. D. Meloy, Lebanon, Ohio.
John Doner, Toledo, Ohio.
John P. Scheidt & Co., Freeport, Ill.
Hartman Bros., Detroit, Mich.
Henry Pflautz, Crescentsville, Ohio.
D. H. Maynes, 301 Morris St., Toledo, Ohio.
Louis Giovanetti, 1619 E. Broad St., Richmond, Va.
F. B. Speakman & Sons, New Bremen, Ohio.
Samuel Streit & Co., New York City.
Clem Backlage, Newport, Ky.
John Gardner, Cincinnati, Ohio.
Thos. A. Sullivan & Co., Cincinnati, Ohio.
J. Rapacinski, Chicago, Ill.
T. C. Power & Bro., Fort Benton, Montana.
Fred C. Seip, Lake Zurich, Ill.
Michael Julg, Reading, Ohio.
Peter Neu, Monroe, Ohio.
Fred Frey, Middletown, Ohio.
Margaret Kilsch, Erie, Pa.
I. T. Keywood, St. Joseph, Mo.
W. H. Pitthan, St. Joseph, Mo.
Y. N. Goodbread Estate, Nevada, Ohio.
D. Spielmann & Co., Dyersville, Iowa.

Seventh. That the following named persons, with their places of residence, respectively, claim to have some interest in parts and parcels of said whiskies, who claim to have loaned and advanced money to said David Rohrer, and that certain whiskies were pledged and hypothecated to them respectively, either at the time of said loan or thereafter. The numbers of the packages and barrels so claimed to be pledged and hypothecated and to whom, are unknown in part to the Trustees, but the names and residences of such
8 as are known to the Trustees are as follows:

John White, Cincinnati, Ohio.
J. F. Sadler & Company, Cincinnati, Ohio.
Harry S. Patterson, Cincinnati, Ohio.
Daniel R. Schaeffer, Dayton, Ohio.
Shields & Company, Cincinnati, Ohio.
First National Bank, Elmwood Place, Ohio.
Fourth National Bank, Cincinnati, Ohio.
F. Burkhardt Estate, Cincinnati, Ohio.
Queen City Savings Bank & Trust Company, Cincinnati, Ohio.
Merchants National Bank, Cincinnati, Ohio.
Black & Company, Cincinnati, Ohio.
First National Bank, Miamisburg, Ohio.
First National Bank, Cincinnati, Ohio.
L. Weiskopf, Cincinnati, Ohio.
Dayton National Bank, Dayton, Ohio.

A. Beckert, Cincinnati, Ohio.
The Pearl Street Market Bank, Cincinnati, Ohio.
Merchants National Bank, Dayton, Ohio.
George Baker, Dayton, Ohio.
The Sol. Rauh & Sons Company, Dayton, Ohio.
Samuel Umbenhauer, Miamisburg, Ohio.
H. Heidersfield, Cincinnati, Ohio.
E. M. Patterson, Cincinnati, Ohio.
Fredericka A. Shields, Cincinnati, Ohio.
Abe Block, Cincinnati, Ohio.
Stephen J. Patterson, Dayton, Ohio.
Charles F. Hofer, Cincinnati, Ohio.

Eighth. That said entire number of barrels of whiskey have all the time been in the actual and exclusive possession and control, from and after its manufacture and deposit in said store houses, in the said David Rohrer, and of his assignees after he made an assignment under the insolvency laws of the State of Ohio, and then of his Receiver in Bankruptcy, and now of his Trustees in Bankruptcy; that said whiskey was never delivered to the said several parties named in the fifth, sixth and seventh paragraphs above, nor have they ever at any time had possession thereof, and that no right or title therein ever passed to, or vested in them, or either of them.

Ninth. That said Exhibits "A" and "B" contain and give the serial numbers of the barrels of whiskey now contained in the said store houses, together with the thirty-two barrels heretofore sold by the Receiver herein under order of this Court.

9 Tenth. That it is necessary, in order to settle the conflicting claims of the estate and of the various parties herein before named, to the said whiskies and parts thereof, that said persons be made parties hereto, and required to file herein their answers, setting up the nature and character of their respective claims and interests, whether they claim to have bought the whiskey claimed by them, and when, and the consideration paid, or agreed to be paid, and whether for a present or past consideration, and the number of barrels claimed, with their serial numbers; and that those who claim to have certain whiskies pledged and hypothecated to them respectively, shall state the agreement of pledge with the consideration, whether past or present, and the amount, and the indebtedness claimed to be secured thereby, the date of the pledge, the number of barrels with the serial number of the same, and such other and further facts on which they found their respective claims.

Eleventh. And further, that in order to settle and close said estate and trust, it will be necessary, after the ascertainment and determination of the claims and rights of the various claimants and of the estate, to make sale of said whiskey in the manner provided by the Bankrupt Act.

Wherefore, The said Trustees pray that said above named persons herein before given may be made parties to this proceeding, and notified of this application, and the object and purpose thereof, in such manner as may be ordered by this Court; that the said several parties, and all others who claim to have any right or interest

in any part or parcel of said whiskies hereinbefore described, may be required to file herein his answer and cross-petition setting up fully the nature and character of his said claim, or claims, and demands in such manner as will fully apprise all parties herein of his claim, interest and demand, if any, and that on final hearing the rights and interests of all the parties may be fully and completely ascertained and determined, and upon final hearing for such findings, judgments and decrees and equitable relief as the Trustees and the various parties respectively may be entitled to in the premises and under the Bankruptcy Act; and for a sale of the said whiskies in the manner provided by the Bankruptcy Act.

CHARLES W. DALE,
EDWARD ROTT,
HENRY AMPT,
Trustees in Bankruptcy of David Rohrer.

10 ROWE, SHEUEY, MATTHEWS & JAMES,
CHARLES E. SWADENER,
Attorneys for Trustees.

UNITED STATES OF AMERICA,
Southern District of Ohio,
Montgomery County, ss:

Charles W. Dale, being duly sworn, says that he is one of the Trustees of David Rohrer, Bankrupt, and that the facts stated in the foregoing application are true as he believes.

CHARLES W. DALE.

Sworn to before me and subscribed in my presence this thirteenth day of December, A. D. 1909.

CLEMENT R. GILMORE,
Notary Public in and for Montgomery County, Ohio.

Notary fee, 40 cents due.

EXHIBITS A AND B.

The Weidemann Co., Cleveland, Ohio.
3 bbl. '06, No. 108068, 108073, 108088.
10 bbl. Feb. '06, No. 108104-108113.

13

Wm. C. Biles Co., Cincinnati, O.
17 bbl. June '05, No. 105557-573.
3 bbl. June '05, No. 105576-578.
19 bbl. June '05, No. 105580-598.
4 bbl. Feb. '06, No. 108250-253.
1 bbl. Apr. '06, No. 109888.
4 bbl. Nov. '06, No. 112836-839.

48

Frank Mueller, Middletown, Ohio.
12 bbl. June '05 No. 106162-173.

J. G. Mader & Sons, Bucyrus, Ohio.
1 bbl. Mch. '06 No. 108458.

Otto Wagner & Bro., Tiffin, Ohio.
1 bbl. Apr. '06, No. 109923.

The C. Hossfeld & Son Co., Hamilton, Ohio.
19 bbl. Mch. '06, No. 108528, 108532-33, 108537-52.

Hugh McIlvain, Cincinnati, Ohio.
4 bbl. Apr, '06, No. 109925-928.

Detrick Distilling Co., Tippecanoe City, Ohio.
50 bbl. Mch. '06, No. 108464-513.
60 bbl. May '06, No. 109659-718.
50 bbl. June '06, No. 111745-794.
45 bbl. June '06, No. 111815-859.
15 bbl. June '06, No. 112199-213.

11
5 bbl. Feb. '07, No. 114717-721.

225

Republic Distributing Co., Cincinnati, Ohio.
35 bbl. June '06, No. 111942-976
15 bbl. June '06, No. 111982-996.
100 bbl. Nov. and Dec. '06 No. 112915-113,014.

150

Geo. F. Baker, Dayton, Ohio.
19 bbl. Jan. '05, No. 100979-993, 100995-998.
2 bbl. Apr. '03, No. 97918-19.
2 bbl. June '03, No. 99550-51.
3 bbl. Mch. '05, No. 102671-673.
3 bbl. Mch. '05, No. 102691-93.
5 bbl. Apr. '05, No. 104079-83.
1 bbl. Apr. '05, No. 104228.
2 bbl. No. 104232-233, Apr. '05.
3 bbl. July '05, No. 106711-713.
35 bbl. Feb. '06, No. 107703-737.
12 bbl. Feb. '06, No. 107741-752.
1 bbl. Mch. '06, No. 109363.
13 bbl. Mch. and Apr. '06, No. 109371-383.
15 bbl. Apr. '06, No. 109389-403.

50 bbl. Apr. '06, No. 110063-112.
10 bbl. May '06, No. 110343-352.
9 bbl. May '06, No. 110359-367.
1 bbl. May '06, No. 110387.
50 bbl. May '06, No. 110505-554.
25 bbl. May '07, No. 117467-491.
56 bbl. May '07, No. 117496-551.
2 bbl. May '07, No. 117560-561.

319

Beech Hill Dist. Co., Cincinnati, Ohio.
44 bbl. July '06, No. 112299-342.
51 bbl. July '06, No. 112393-443.

95

The Frank G. Tulledge Co., Cincinnati, Ohio.
35 bbl. Feb. '06, No. 107768-802.
50 bbl. Jan. '07, No. 114415-464.

85

Jos. Silverman & Co., Cincinnati, Ohio.
1 bbl. Jan. '06, No. 111409.

The Oneal Parker Co., Covington, Ky.
85 bbl. Feb. '07, No. 114772-856.

12

The National Distributing Co., Cincinnati, Ohio.
15 bbl. Apr. '05, No. 103594-608.

Virginia Carolina Grocery Co., Richmond, Va.
3 bbl. Apr. '05, No. 103946-948.

Geo. M. Graves & Son, Dayton, Ohio.
10 bbl. May '05, No. 105074-083.
40 bbl. Feb. '07, No. 114932-971.
25 bbl. May '07, No. 117722—746.

75

The George Biles Co., Cincinnati, Ohio.
1 bbl. Apr. '06, 110012.
15 bbl. Dec. '06, No. 113050-064.

16

Chas. W. Sanders, Dayton, Ohio.
2 bbl. Apr. '07, No. 117035-036.

Ulman Emstein Co., Cleveland, Ohio.
4 bbl Apr. '07, No. 117103-106.

Nexter & Co., Memphis, Tenn.
80 bbl. Jan. '07, No. 113835-914.

S. J. Patterson, Dayton, Ohio.
100 bbl. Jan. '07, No. 116577-676.

The Albert M. Gugenheim Co., Cincinnati, Ohio.
5 bbl. Jan. '06, No. 110233-237.
6 bbl. May '06, No. 110307-312.
5 bbl. May '06, No. 110333-337.
50 bbl. May '06, No. 110735-784.
5 bbl. Jan. '07, No. 114470-474.
55 bbl. Apr. '07, No. 116706-716, 116719-721, 116727-751, 116756-771.

126

Fred Kette Sons Co., Dayton, Ohio.
5 bbl. Feb. '05, No. 101919-923.
11 bbl. Feb. '05, No. 102186-193, 102226-228.
2 bbl. Mch. '03, No. 97003-04.
1 bbl. Feb. '05, No. 102208.
1 bbl. Feb. '05, No. 102223.
2 bbl. Apr. '05, No. 103877-878.
8 bbl. Apr. '05, No. 104156-163.
15 bbl. May '05, No. 104544-558.
5 bbl. Feb. '06, No. 107623-627.
5 bbl. Feb. '06, No. 108314-318.
15 bbl. May '06, No. 110620-634.
20 bbl. June '06, No. 111795-814.
10 bbl. June and July '06, No. 112224-233.
15 bbl. July '06, No. 112274-288.

13

4 bbl. July '06, No. 112290-293.
10 bbl. Nov. '06, No. 112570-574, 112590-594.
1 bbl. Nov. '06, No. 112604.
25 bbl. Mch. '07, No. 116002-026.
60 bbl. June '07, No. 118572-631.

215

Dayton Club, Dayton, Ohio.
3 bbl. Feb. '05, No. 102361-363.

Louis Poock, Cincinnati, Ohio.
3 bbl. Mch. '03, No. 97234, 97239, 97409.
1 bbl. Mch. '05, No. 103393.

4

L. Weiskopf, Cincinnati, Ohio.
4 bbl. Feb. '05, No. 101813-812, 101817-818.

Turner Dist. Co., Cincinnati, Ohio.
25 bbl. June '03, No. 100027-051.
35 bbl. June '03, No. 100082-115.

Richard & Co., Washington, D. C.
3 bbl. Mch. '05, No. 102631-633.

Schauer Dist. Co., Dayton, Ohio.
10 bbl. Feb. '05, No. 102414-423.
3 bbl. Feb. '06, No. 107900-902.
100 bbl. Apr. '06, No. 109559-658.
5 bbl. Apr. '06, No. 109978-982.
5 bbl. May '06, No. 110595-599.
9 bbl. May '06, No. 110601-609.
100 bbl. May '06, No. 110635-734.
150 bbl. May '06, No. 111060-209.
10 bbl. May '06, No. 111215-224.
2 bbl. May '06, No. 111228-229.
250 bbl. June '06, No. 111495-744.

644

I. Trager Co., Cincinnati, Ohio.
10 bbl. June '03, No. 99771-780.
25 bbl. June '03, No. 99806-830.
100 bbl. Apr. '06, No. 109404-503.
30 bbl. June '06, No. 111305-334.
67 bbl. June '06, No. 111338-404.

232

Sol. Rauh & Sons Co., Dayton, Ohio.
15 bbl. Jan. '05, No. 101064-078.
70 bbl. Jan. '06, No. 106758-827.
10 bbl. Apr. '06, No. 109894-903.
70 bbl. Feb. '07, No. 114862-931.

165

14

T. F. Creighton, Manitou, Colo.
5 bbl. Jan. '05, No. 100879-883.
10 bbl. Feb. '06, No. 107903-907, 107909-913.

15

Max Fruhauf Co., Cincinnati, Ohio.
3 bbl. Apr. '05, No. 98177-179.

S. N. Weil & Co., Cincinnati, Ohio.
30 bbl. Jan. '05, No. 100919-938, 100944-953.
3 bbl. May '05, No. 104731-733.

33

C. Sandheger, Cincinnati, Ohio.
5 bbl. Apr. '03, No. 97540-544.
20 bbl. Apr. '03, No. 97565-584.
5 bbl. May '03, No. 98880-84.
5 bbl. May '03, No. 98955-59.
1 bbl. Jan. '05, No. 100838.
1 bbl. Mch. '05, No. 102873.
5 bbl. Mch. '05, No. 102894-898.
6 bbl. Mch. '05, No. 103013-018.
59 bbl. Jan. '06, No. 107063-112, 107114-122.
3 bbl. Jan. '06, No. 107125-127.
112 bbl. Jan. '06, No. 107141-252.
5 bbl. Jan. '06, No. 107273-277.
5 bbl. Jan. '06, No. 107298-302.
100 bbl. Jan. '06, No. 107403-502.
5 bbl. Jan. '06, No. 107538-542.
100 bbl. Mch. '06, No. 108554-653.
195 bbl. Mch. '06, No. 108659-853.
10 bbl. Mch. '06, No. 109014-023.
143 bbl. Mch. '06, No. 109056-198.
103 bbl. Mch. '06, No. 109201-303.
100 bbl. Nov. '06, No. 112635-734.
75 bbl. Nov. '06, No. 112760-835.
195 bbl. Dec. '06, No. 113120-314.
3 bbl. Feb. '07, No. 115254-256.
100 bbl. Feb. '07, No. 115277-376.
100 bbl. Mch. '07, No. 116027-126.
15 bbl. Mch. '07, No. 116167-181.
350 bbl. Mch. and Apr. '07, No. 116227-576.
1 bbl. Apr. '07, No. 117931.
26 bbl. Apr. '07, No. 116936-961.
13 bbl. Apr. '07, No. 116964-976.
45 bbl. Apr. '07, No. 116977-117021.

1911

15

Weidemann Co., Cleveland, Ohio.

15 bbl. Dec. '04, No. 100440-454.
5 bbl. Mch. '05, No. 102569-573.
11 bbl. July '05, No. 106478-488.

31

M. Durner & Co., Cincinnati, Ohio.

5 bbl. June '02, No. 94320-324.
13 bbl. Feb. '06, No. 107657, 107659-662, 107665-667, 107673-677.
5 bbl. Apr. '06, No. 109719-723.
2 bbl. May '06, No. 111058-59.
24 bbl. Jan. '07, No. 113935-944, 113946-959.
3 bbl. Feb. '07, No. 114699-701.
9 bbl. Feb. '07, No. 115388-396.
4 bbl. Feb. '07, No. 115523-526.

65

Mountain Dist. Co., Cincinnati, Ohio.

4 bbl. June '03, No. 100118-121.
5 bbl. Dec. '04, No. 100395-399.
7 bbl. Feb. '05, No. 102487-493.
4 bbl. Mch. '05, No. 102505-508.
1 bbl. Mch. '05, No. 102513.
10 bbl. May '05, No. 105139-143, 105149-153.
2 bbl. May '05, No. 105188-105193.
3 bbl. June '06, No. 111939-941.
5 bbl. Mch. '05, No. 102544-548.

41

Wm. C. Biles Co., Cincinnati, Ohio.

3 bbls. June '03, No. 99350-51-99361.
25 bbl. June '03, No. 99472-496.
25 bbl. Feb. '05, No. 102254-278.
5 bbl. May '03, No. 99205-209.
2 bbl. Dec. '04, No. 100568-569.

60

Weideman Freis Co., Cleveland, Ohio.

3 bbl. Jan. '07, No. 113927-929.

The John Deis Co., Dayton, Ohio.

14 bbl. Jan. '06, No. 106913-922, 106924-927.
10 bbl. Feb. '06, No. 107628-637.
5 bbl. Apr. '06, No. 110173-177.

10 bbl. Jan. '07, No. 113915-924.
15 bbl. Jan. '07, No. 114375-389.
20 bbl. Feb. '07, No. 115677-696.

16

30 bbl. Feb. '07, No. 115532-561.
25 bbl. Apr. '07, No. 116787-811.
25 bbl. Apr. '07, No. 117062-086.

154

Hulman & Co., Terre Haute, Ind.
100 bbl. Jan. '06, No. 106928-107027.
30 bbl. Feb. '06, No. 107984-108013.
10 bbl. Feb. '06, No. 108024-033.
95 bbl. Jan. '07, No 114475-569.
60 bbl Jan. '07, No. 114617-676.

295

C. Sunstein & Sons, Pittsburg, Pa.
15 bbl. Feb. '07, No. 115437-451.

The Peter Weber Co., Middletown, Ohio.
3 bbl. May '05, No. 105301-303.
2 bbl. May, '05, No. 105322-323.
2 bbl. May '05, No. 105327-328.
4 bbl. May '05, No. 105330-333.
10 bbl. June '06, No. 112214-223.
10 bbl. July '06, No. 112234-243.
3 bbl. July '06, No. 112246-248.
2 bbl. July '06, No. 112256-253.
18 bbl. July '06, No. 112256-273.

54

M. Dernham & Son, Cincinnati, Ohio.
10 bbl. June '05, No. 105444-453.
7 bbl. June '05, No. 105527-533.
7 bbl. May '06, No. 111245-251.
25 bbl. Feb. '07, No. 115462-486.

49

5538 bbl. Total.

"EXHIBIT B."

D. Rohrer, unsold and unpledged as we are informed.
15 bbl. Nov. '01, No. 88416-419, 88431-434, 88625-629.

19 bbl. Dec. '01, No. 88990-994, 89486-489, 89494-503.
1 bbl. Jan. '02, No. 89560.
3 bbl. Feb. '02, No. 90694, 91801, 91104.
30 bbl. June '02, No. 94440-444, 94455-468, 94485-490, 94630-634.
1 bbl. May '03, No. 99252.
2 bbl. June '03, No. 99392-100016.
8 bbl. July '03, No. 100357-364.
9 bbl. Dec. '04, No. 100383-384, 100417-419, 100775-778.

17

5 bbl. Jan. '05, No. 101159-163.
22 bbl. Feb. '05, No. 102288, 102339-356, 102364, 102177-178.
38 bbl. May and July '05, No. 104559-588, 104849-857, 105384-388.
72 bbl. June and July '05, No. 105514-515, 106,224-253, 106269-308.
50 bbl. July '05, No. 106369-377, 106433-447, 106448-463, 106514, 106620-623, 106719, 106735-738.
85 bbl. Jan. '06, No. 106828-912.
12 bbl. Feb. '06, No. 107648-652, 107678-684.
33 bbl. Apr. '06, No. 109930-962.
33 bbl. May '06, No. 110472-504.
2 bbl. May '06, No. 111240-241.
25 bbl. May and June '06, No. 111252-276.
2 bbl. June '06, No. 111303-304.
10 bbl. June '06, No. 111927-936.
12 bbl. June '06, No. 112107-118.
1 bbl. June '06, No. 112170.
23 bbl. June '06, No. 112171-193.
3 bbl. June '06, No. 112196-198.
5 bbl. June '06, No. 112444-448.
28 bbl. July '06, No. 112452-479.
60 bbl. July '06, No. 112505-564.
50 bbl. Dec. '06, No. 113065-114.
5 bbl. Jan. '07, No. 113930-934.
5 bbl. Jan. '07, No. 114465-469.
21 bbl. Feb. '07, No. 114736-756.
582 bbl. June and July '07, No. 118822-119403.
283 bbl. July '07, No. 119514-796.

1553

Balance of 2758 bbls. we have no definite account of at this time.

Memorandum of Whiskies Claimed to Have Been Pledged.

5 bbl. June '03, No. 100142-46.
10 bbl. May '05, No. 104444-453.
10 bbl. May '05, No. 104479-488.
5 bbl. May '05, No. 104504-508.
7 bbl. June '05, No. 105702-708.
5 bbl. June '05, No. 105749-753.

4 bbl. June '05, No. 105755-758.
10 bbl. June '05, No. 105764-773.
5 bbl. June '05, No. 106064-068.
2 bbl. June '05, No. 106072-073.
5 bbl. July '05, No. 106314-318.
5 bbl. July '05, No. 106324-328.
8 bbl. July '05, No. 106331-338.

18

5 bbl. July '05, No. 106354-358.
5 bbl. July '05, No. 106515-519.
15 bbl. July '05, No. 106550-564.
40 bbl. Feb. '06, No. 108349-388.
5 bbl. April '06, No. 109734-738.
3 bbl. April '06, No. 109841-843.
35 bbl. April '06, No. 109849-883.
25 bbl. May '06, No. 110565-589.
175 bbl. May, '06, No. 110875-111049.
2 bbl. June '06, No. 111413-414.
2 bbl. June '06, No. 112105-106.
490 bbl. Dec. '06, and '07, No. 113315-804.
129 bbl. Jan. '07, No. 113960-114088.
261 bbl. Jan. '07, No. 114094-354.
10 bbl. Feb. '07, No. 115377-386.
190 bbl. Mch. '07, No. 115812-116001.
10 bbl. Apr. '07, No. 116777-786.
330 bbl. Apr. '07, No. 117137-466.
95 bbl. May '07, No. 117837-951.
100 bbl. May '07, No. 117957-118056.
450 bbl. May and June '07, No. 118107-556.
190 bbl. June '07, No. 118632-821.
110 bbl. July '07, No. 119404-513.

2758 bbl. **Total.**

EXHIBIT No. 2.

In the District Court of the United States for the Southern District of Ohio, Western Division.

In the Matter of DAVID ROHRER, Bankrupt.

Answer and Intervening Petition of E. M. Pattison.

Now comes E. M. Pattison, one of the defendants mentioned in the seventh paragraph of the Application of the Trustees heretofore filed herein by Charles W. Dale, Edward Rott and Henry Ampt, Trustees of David Rohrer, and enters his appearance as a defendant to said application, and says:

First. He admits that for many years prior to the filing of the petition herein for the adjudication of the said David Rohrer as a bankrupt, the said David Rohrer had been engaged in the business

of distilling Bourbon and Rye whiskies at his Distillery located near the village of Germantown, Montgomery County, Ohio, and that part of his plant and distillery consisted of four separate buildings in which the whiskies manufactured by him were placed.

He denies that said whiskies set forth in said application were or ever have been in the possession of the said David Rohrer as
19 stated in said application, but alleges that all of said whiskies as soon as manufactured were placed in said distillery and building in the sole and exclusive possession and control of the Government of the United States of America, which has through its officers and agents so remained in possession of said whiskies from the time of the manufacture thereof up to the present time, and that it will remain in the exclusive possession and control thereof under the laws of the United States until the taxes due thereon are fully paid. That the taxes due the United States on all of the whiskies set forth in said application were unpaid at the time when said David Rohrer was adjudicated a bankrupt and are still unpaid.

Second. This defendant further says that he admits that the buildings mentioned in the Third Paragraph of the application were used exclusively for the storage of whiskies manufactured by the said David Rohrer until the tax thereon levied by the Government was paid, and he denies that the same were used for any other purpose as set forth in said application.

Third. He admits that at the time of the adjudication of the said David Rohrer as a bankrupt and the appointment and qualification of said trustees there were stored in said buildings 9849 barrels of Bourbon and Rye Whiskey, which had been made by the said David Rohrer and had been placed therein by him, but he denies that the same was placed in said warehouses for any other purpose than that the same should be held and remain in the exclusive possession and control of the United States government until the tax thereon was paid. He denies that the title to any of the barrels of whiskey in which this defendant is interested (and being part of the 9849 barrels aforesaid), hereinafter set forth, ever passed to the said Trustees upon their appointment or into their possession and he denies that said trustees at any time since their appointment, or now, hold possession of the same or any part thereof as set forth in the Fourth Paragraph of said application.

Fourth. This defendant has not the means of knowledge upon which he can form a judgment or belief as to the matters set forth in the Fifth and Sixth Paragraphs of said application, and he demands strict proof thereof.

Fifth. As to the matters and things set forth in the Seventh Paragraph of said application this defendant says "that on or about February 23rd, 1906, he loaned said David Rohrer Five Thousand ($5,000.00) dollars for which said David Rohrer executed and de-
20 livered to him his promissory note payable in four months after date which was renewed from time to time and to secure the same assigned and transferred in writing his entire interest in 700 barrels of Bourbon and Rye Whiskey then in the possession of the United States Government and stored in Warehouses Nos. 1 and 2 of said Distillery Plant, of which 644 barrels

contained Bourbon whiskey and 56 barrels contained Rye Whiskey. That 350 barrels of said whiskey was manufactured prior to February 23rd, 1906, 294 barrels thereof being stored in Warehouse No. 1 and 56 barrels thereof in Warehouse No. 2. That the serial numbers of said 350 barrels so stored in said warehouses are as follows, viz: 107853 to 108002 inclusive, and 108003 to 108202 inclusive.

That the remaining 350 barrels of Bourbon whiskey was at the date that this defendant loaned said David Rohrer said $5,000.00 in process of manufacture and it was agreed and made part of the contract by which said money was loaned that when the manufacture thereof was completed that said David Rohrer would transfer to this defendant his interest in said 350 barrels of bourbon whiskey, and that when the process of manufacture of 200 barrels of said remaining 350 barrels was complete that the same were stored in warehouse No. 1 and placed in the possession of the United States Government, and that the said David Rohrer did on the 2nd day of March, 1906, transfer and assign in writing to this defendant his entire interest in said 200 barrels of whiskey aforesaid, the serial numbers of the same being 108203 to 108402 inclusive; and when the process of manufacture of the remaining 150 barrels was complete the same were stored and placed in the possession of the United States Government in Warehouse No. 1 aforesaid, and on March 9th, 1906, the said David Rohrer assigned and transferred in writing to this defendant in said 150 barrels of whiskey, the serial numbers of the same being 108403 to 108552 inclusive.

That said note was not paid when it became due and it was agreed that the same should be renewed from time to time and the said David Rohrer did agree in consideration of the renewal thereof that his entire interest in said 700 barrels of whiskey aforesaid should continue in this defendant as security therefore. That in accordance with said agreement this defendant did renew said note at various times until September 22nd, 1909, when the said David Rohrer executed and delivered to this defendant his promissory note of that date for said sum of $5,000, payable four months after date, and as security therefore this defendant still continues to hold said warehouse receipts above set forth. That no part of said indebted-
21 ness has been paid and that there is due to this defendant on account thereof from the said David Rohrer, said sum of $5000.00 with interest from January —, 1910.

That afterwards to-wit., on June 29th, 1905, the said David Rohrer borrowed of this defendant the further sum of $500.00, for which he executed his note payable to this defendant in four months after date, which has been renewed from time to time, and in order to secure the payment of the said note the said David Rohrer assigned and transferred in writing to this defendant 100 barrels of Bourbon whiskey then stored in Warehouse No. 1, the serial numbers of the same being 109704 to 109803 inclusive.

That said note of June 29th, 1905, was not paid when due, and it was agreed that the same should be renewed from time to time, and the said David Rohrer did agree in consideration of the renewal thereof that his entire interest in said 100 barrels of whiskey aforesaid should continue in this defendant as security for said indebted-

ness. That in accordance with said agreement this defendant did renew said note at various times and on September 25th, 1909, the said David Rohrer did execute and deliver to this defendant, in renewal of said note, his certain promissory note of that date for the sum of $500.00 payable in four months from said date, and did then and there agree in consideration of said renewal that this defendant should continue to hold as security for said indebtedness the 100 barrels of whiskey above mentioned, bearing serial numbers 109704 to 109803 inclusive. That no part of said indebtedness has been paid and that there is due to this defendant from the said Rohrer on account thereof said sum of $500.00 with interest from — day of January, 1910.

Sixth. That the said David Rohrer did at the time he borrowed said money from this defendant deliver to him his entire interest and right to the possession thereof, together with the right upon the payment of the Government Tax on any or all of the barrels so transferred to him, to have said whiskey delivered to him or his assigns. That in consummation of said agreement and transfer, he delivered to this defendant five written instruments copies of which are hereto attached and made part hereof marked Exhibits "A," "B," "C," "D" and "E" respectively. This defendant says that the said David Rohrer has not paid the said five thousand dollars or the said five hundred dollars so loaned him by this defendant, and that there is due to him on account thereof the sum of $5,500.00 with interest from January 22nd, 1910.

22 That 210 barrels of said whiskey and bearing the following serial numbers, to-wit:

108068, 108073, 108088	3 bbls.
108104, 108113	10 "
108250, 108253	4 "
108458	1 "
108528, 108532-33, 108537-52	19 "
108464-513	50 "
109704-109718	15 "
108314-108318	5 "
107900-107902	3 "
107903-907, 107909-913	10 "
109719-109723	5 "
107984-108013	30 "
108024-108033	10 "
108349-388	40 "
109734-109738	5 "
A total of	210 bbls.

so transferred to this defendant are now in said warehouse of said Distillery Plant awaiting the payment of the Government Tax, and that this defendant is the owner thereof and has the right to the possession thereof upon such payment. That the remaining 590 barrels of whiskey so transferred to this defendant, were sold and removed from said warehouse by said David Rohrer without the knowledge or consent of this defendant.

This defendant denies that said whiskey or any part thereof has been in the actual and exclusive possession of and control, from and after the time of the manufacture thereof and deposit in said warehouses, in the said David Rohrer, and he alleges that he has been at all times since the transfer thereof to him as security for the payment of said loans, and is now, entitled to the possession thereof.

Seventh. He denies each and every allegation in said application not herein admitted and prays that the court may as against said trustees of the said David Rohrer, and each of the other defendants herein, adjudge and determine the title to said whiskies, in so far as the same are now situated in said warehouses, to be in this defendant, and that he may have such other and further relief as he may be legally and equitably entitled to.

HEALY, FERRIS & McAVOY,
Attorneys for E. M. Pattison, Defendant.

23 UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division:

On this 15th day of January, A. D. 1910, before me personally appeared E. M. Pattison, one of the defendants named in said application, who made oath that he read the foregoing Answer and Intervening Petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes it to be true.

E. M. PATTISON.

Sworn to before me and subscribed in my presence this 15th day of January, 1910.

JOHN E. MOLONEY,
Notary Public in and for Hamilton County, Ohio.

EXHIBIT "A."

No. 750.

Stored in Warehouse
56 bbls. in No. 2.
94 bbls. in No. 1.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *Feb.* 23, 1906.

Received in my Distillery Bonded Warehouse No. 11 First District of Ohio, for account and subject to the order of E. M. Pattison

deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

One hundred and fifty Barrels D. Rohrer Pure Bourbon Whiskey, entered into bond as follows; 56 Bbls. Rye; 94 Bbls. Bourbon.

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
107853					
108002	7600.49	102	7405.70	Feb. 10,12,13, 14 & 15/06	Y 44953
					45102

56 Rye
94 Bourbon

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage
24 on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment of excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal — Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agreed to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT "B."

No. 748.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *Feb.* 23*rd*, 1906.

Received in my Distillery Bonded Warehouse No. 11 First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and Storage at the rate of Five Cents per barrel per month from Storage free

Two Hundred Barrels D. Rohrer Pure Bourbon Whisky, entered into bond as follows:

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
108003					
108202	9810.73	101 102	9988.28	Feb. 15, 16,17, 19, 20, 21 & 22/06	Y 45103
					302

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that
25 the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT "C."

No. 747.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *Mch. 2nd*, 1906.

Received in my Distillery Bonded Warehouse No. —, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

Two hundred barrels D. Rohrer Pure Bourbon Whiskey, entered into bond as follows:

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
108203					
108402	9786.97	101 102	9965.12	Feb. 22, 23, 24, 26, 27 & 28/06 -	Y 45303
					45502

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that
26 the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposd by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT "D."

No. 746.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *March* 9, 1906.

Received in my Distillery Bonded Warehouse No. —, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

One hundred and fifty Barrels D. Roherer Pure Bourbon Whisky, entered into bond as follows:

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
108403					
552	7239.66	101 102	7368.62	Feb. 28 & March 1, 2, 3, 5/06	Y 45503
					652

Gauged by F. P. Thompson, U. S. Gauger.

27 Loss or damage, by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposd by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT "E."

No. 1492.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *June* 29, 1906.

Received in my Distillery Bonded Warehouse No. —, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

One hundred Barrels D. Roherer Pure Bourbon Whisky, entered into bond as follows:

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
109704		101			
109803	4822.52	102	4910.73	April 11, 12, 13, 14/1906	Y 91204
					91303

Gauged by F. P. Thompson, U. S. Gauger.

28 Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price, therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposd by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT No. 3.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423.

In re DAVID ROHRER, a Bankrupt.

Filed April 15, 1910.

Amendment to Answer & Cross Petition of E. M. Pattison.

For an amendment to his answer and cross-petition herein, the said E. M. Pattison says "that for more than forty years last past and ever since the enactment by the Congress of the United States of the laws relating to the storing by distillers of whiskey in distillery bonded warehouses, it has been and still continues to be the usual and customary course of doing business by distillers of whiskey to sell, pledge and transfer whiskey deposited by them in their distillery bonded warehouses by the making, issuing and delivering by them of their warehouse receipts to the vendee or pledgee of the barrels of whiskey sold or pledged (describing and identifying in said warehouse receipts the barrels of whiskey sold or pledged, by their serial numbers, the date of their manufacture, the warehouse stamps thereon and the number of the bonded warehouse in which situated and agreeing in said warehouse receipts to hold said barrels
29 of whiskey sold or pledged for the account and subject to the order of the vendee or pledgee thereof and in and by the sale and pledge as aforesaid of barrels of whiskey in their distillery bonded warehouses to obtain money and advances of money to enable them to carry on business as distillers, and, during all of said time it has been and continues to be among distillers and bankers, brokers, dealers in whiskey and all persons having transactions with distillers an established custom and a commercial usage generally known and acted upon to regard and consider said warehouse receipts as giving constructive possession of the barrels of whiskey mentioned therein and as conveying either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferable by indorsement either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in or possession of the barrels of whiskey mentioned in said warehouse receipts according to the rights of the original parties to the transaction and as constituting the owner of the distillery bonded warehouse issuing and delivering such warehouse receipts as the bailee for the vendee or pledgee of the barrels of whiskey in said warehouse receipts mentioned; and this practice and method of doing business has obtained for more than forty years, and becomes an important part of the commercial system of the country, so that it is well understood and according to the usual

course of business that the use and purpose of a warehouse receipt is to enable the owner of said distillery bonded warehouse to sell, pledge and transfer the title or the possession of the barrels of whiskey in his bonded warehouse for the purpose of raising money or securing advances thereon either by sale or peldge.

And the said defendant asks that this amendment may be taken as a part of his original answer and cross-petition.

HEALY, FERRIS & McAVOY,
Attorney- for E. M. Pattison.

STATE OF OHIO,
County of Hamilton, ss:

John C. Healy being first duly sworn says that he is the attorney for the defendant above named and that the statements contained in the foregoing amendment to his answer and cross petition are true as he verily believes.

JOHN C. HEALY.

30 Sworn to before me and subscribed in my presence this 14th day of April, 1910.

JOHN E. MOLONEY,
Notary Public in and for Hamilton County, Ohio.

EXHIBIT No. 4.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

Demurrer of Charles W. Dale, Edward Rott, and Henry Ampt, as Trustees in Bankruptcy of the said David Rohrer, to the Answer and Intervening Petition of E. M. Pattison Filed to the Application of said Trustees.

Filed March 26, 1910.

Now come the said Charles W. Dale, Edward Rott and Henry Ampt, as Trustees of David Rohrer, Bankrupt, and demur to the Answer and Intervening Petition of E. M. Pattison for the reason—

First. That said Answer and Intervening Petition does not state facts sufficient to constitute a cause of action.

Second. That it is apparent upon the face of said Answer and Intervening Petition that the said E. M. Pattison is not entitled in law to the whiskey therein described nor to a lien thereon, nor to the relief therein sought.

ROWE, SHUEY, MATTHEWS & JAMES,
Attorneys for said Trustees.

EXHIBIT No. 5.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

Entry Sustaining the Demurrer to the Answer and Intervening Petition of E. M. Pattison.

Filed July 9, 1910.

This day this cause came on for hearing upon the demurrer of Charles W. Dale, Edward Rott and Henry Ampt as Trustees of David Rohrer, Bankrupt, to the Answer and Intervening Petition of E. M. Pattison as amended by the filing of an amendment thereto, it having been stipulated that this demurrer should be considered as filed to the amendment as well as to the original Answer and
31 Intervening Petition. Said demurrer was argued by Counsel and submitted to the Referee who being fully advised in the premises, finds said demurrer to be well taken and therefore sustains the same. The said Intervening petitioner not desiring to plead further, or to amend, it is ordered that the barrels of whiskey claimed by him as a pledge, be held in possession of said Trustees and administered free from all claims and liens of the said E. M. Pattison. To all of which said E. M. Pattison excepts.

Said intervening petitioner, E. M. Pattison, is given leave to file his petition for review on or before July 12th, 1910.

W. S. McCONNAUGHEY,
Referee in Bankruptcy.

EXHIBIT No. 6.

In the District Court of the United States for the Southern District of Ohio. Western Division.

No. 4423.

In re DAVID ROHRER, a Bankrupt.

Petition of E. M. Pattison to Review Order of the Referee Sustaining the Demurrer of Charles W. Dale, Edward Rott, and Henry Ampt, as Trustees of David Rohrer, a Bankrupt, to the Answer and Intervening Petition of said E. M. Pattison as Amended by the Filing of an Amendment Thereto.

The petitioner, E. M. Pattison, respectfully represents that heretofore, to-wit, on the 15th day of November 1909, David Rohrer, who had theretofore for a long period of time, been engaged in the

manufacture of whiskies and distilled spirits on certain premises situated in Germantown, Montgomery County, Ohio, on which his distillery and certain United States Bonded Warehouses were located was adjudged a bankrupt by order of this court, and Charles W. Dale, Edward Rott and Henry Ampt were duly appointed by said Court Trustees of said bankrupt and are still acting as such, and said cause was referred together with all matters connected therewith, to W. S. McConnaughey, one of the Referees in bankruptcy of said Court.

That on the 18th day of January, 1910, your petitioner by leave of court filed his certain Answer and Intervening Petition, and afterwards on the 15th day of April, 1910, an amendment thereto, wherein he asserted title to certain packages or barrels of whiskey stored in the certain bonded warehouses situated on the premises in which said distillery was operated and in which the said David Rohrer had been engaged in the manufacture of whiskies
32 and distilled spirits as aforesaid and claiming the right to said whiskies by way of pledge as against the said Trustees and all other persons, all of which is set forth in said answer and intervening petition, to which reference is hereby made.

That on the 26th day of March, 1910, the said trustees filed a demurrer to said answer and intervening petition which was ordered by the Referee aforesaid to stand as a demurrer to said answer and intervening petition as amended as aforesaid, and reference is hereby made to said demurrer for the grounds thereof.

That afterwards, to-wit; on the 15th day of April, 1910, said cause came on for hearing before said Referee upon said demurrer and was argued by counsel and submitted to the court, upon consideration whereof said referee did on the 9th day of July, 1910, sustain said demurrer and did order and adjudge that the barrels of whiskey claimed by your petitioner as a pledge be held in the possession of said trustees and administered free from all claim or lien by your petitioner, and giving your petitioner leave to file his petition for review on or before July 12, 1910.

Your petitioner respectfully represents that there is manifest error to the prejudice of your petitioner in the finding and order made by the Referee sustaining the demurrer of Charles W. Dale, Edward Rott and Henry Ampt as Trustees of David Rohrer, a bankrupt, to said answer and intervening petition of the said E. M. Pattison * * * as amended by the filing of the amendment thereto, and in ordering in and by its said entry that the barrels of whiskey claimed by the said E. M. Pattison * * * as pledged be held in the possession of said Trustees and administered free and clear of all claim and lien of the said E. M. Pattison.

First. That the said Referee erred in holding, in and by its said order, that the said demurrer of the said Trustees of said bankrupt was well taken and in sustaining the same.

Second. That the said Referee erred, in the said order in ordering and directing that the barrels of whiskey claimed by said E. M. Pattison * * * in his said answer and intervening petition and the amendment thereto as a pledge, be held in possession of said

Trustees and administered free from all claim and lien of the said E. M. Pattison.

Third. That the said Referee erred, in its said order, in holding that the said E. M. Pattison * * * had no lien upon or claim to the said barrels of whiskey mentioned and described in
33 his said answer and intervening petition and the amendment thereto and in the warehouse receipts, copies of which are filed as exhibits to said answer and intervening petition.

Fourth. That the said Referee erred, in the said order in holding that the facts stated and the transactions set up by the said E. M. Pattison * * * said answer and intervening petition herein and in the amendment thereto, did not constitute a valid pledge to the said E. M. Pattison * * * of the barrels of whiskey mentioned in his answer and intervening petition and the amendment thereto and in the copies of the warehouse receipts filed as exhibits to said answer and intervening petition, and did not operate to invest the said E. M. Pattison * * * with the possession of the said barrels of whiskey.

Fifth. That the said Referee erred, in its said order, in holding that the facts stated and the transactions set up by said E. M. Pattison his * * * said answer and intervening petition and the amendment thereto, did not operate to give to said E. M. Pattison * * * a valid lien by way of pledge upon said barrels of whiskey under the law of Ohio.

Your petitioner therefore prays that the errors complained of and the questions of law and of fact raised before said Referee on said demurrer and so as aforesaid decided by him may be certified by said Referee to the Honorable Howard C. Hollister, District Judge of the United States for the Southern District of Ohio; that he may review the order heretofore made and make an entry or order, or direct the referee to make an entry or order setting aside the entry and order heretofore made by said Referee as hereinbefore set forth, and directing said Referee to make an entry or order overruling said demurrer; and directing said Referee to make an entry holding the lien claimed by your Petitioner to be a valid and subsisting lien upon the property set forth in his said answer and intervening petition and that he may be restored to all things lost by reason of the findings and order of the referee in said matter. And your Petitioner ever prays.

E. M. PATTISON, *Petitioner.*
HEALY, FERRIS & McAVOY,
Attorneys for Petitioner.

Filed July 9, 1910.

34 EXHIBIT "6."

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, a Bankrupt.

Certificate of Referee upon Petition for Review of the Order of the Referee Sustaining the Demurrer of the Trustees to the Answer and Cross-Petition of E. M. Pattison; Also the Demurrer of The Detrick Distilling Company to the Answer and Cross-Petition of E. M. Pattison.

I, W. S. McConnaughey, one of the Referees of said Court of Bankruptcy do hereby certify that in the course of the proceedings in said case before me the following questions arose pertinent to said proceedings:

On December 30th, 1909, the Trustees filed an application for the determination of the rights of the various claimants to the whiskey in the warehouse of the bankrupt and an order as to the disposal thereof. A copy of said application is filed herewith.

On January 7th, 1910, due notice of this application was sent by mail to each of the creditors of said bankrupt and by registered mail to each of the parties named in said application as having or claiming to have any interest in or lien upon said whiskey.

On January 18th, 1910, E. M. Pattison, filed an answer and cross petition to said application admitting some of the allegations and denying others, and setting up a claim to certain barrels of said whiskey as pledgee thereof to secure an indebtedness therein set forth. Said answer and cross petition is filed herewith.

On March 26th, 1910, the Trustees in this case filed a demurrer to said answer and cross petition. Said demurrer is filed herewith.

On April 15th, 1910, said E. M. Pattison filed an amendment to said answer and cross petition and it was stipulated that said demurrer should be considered as filed to the amendment, as well as to the original answer and cross petition. Said amendment is filed herewith.

On May 10, 1910, the Detrick Distilling Company filed a demurrer to said answer and cross-petition. The interest of said Detrick Distilling Company is shown by its answer and cross petition filed in said case which is attached to the certificate upon the petition for review by the Pearl Street Market Bank, this day certified.

On July 9, 1910, an order was entered by the Referee sustaining said demurrer of the Trustees and ordering the Trustees to
35 hold said whiskey and administer the same free of all claim or lien of said E. M. Pattison. Said order is filed herewith.

On July 9, 1910, said E. M. Pattison filed a petition for review of said order. Said petition is filed herewith.

On July 25th, 1910, an order was entered by the Referee sustaining said demurrer of The Detrick Distilling Company.

On July 25, 1910, said E. M. Pattison filed a petition for review of said order. Said petition is filed herewith.

The question to be determined is: What interest, if any, has E. M. Pattison, under the allegations in his answer and cross petition, the amendment thereto, and the allegations of the application of the trustees admitted by him, in the whiskey described in his answer and cross petition.

Said question is certified to the Judge for his opinion therein.

Dated at Dayton, Ohio, this 2nd day of August, A. D. 1910.

W. S. McCONNAUGHEY,
Referee in Bankruptcy.

EXHIBIT "7."

In the District Court of the United States for the Southern District of Ohio, Western Division.

In Bankruptcy.

In the Matter of DAVID ROHRER, a Bankrupt.

Entry.

This day this cause came on to be heard upon the petition for review of E. M. Pattison, of the order of W. S. McConnaughey, as Referee in Bankruptcy, sustaining a demurrer of the Trustees in Bankruptcy of said David Rohrer to the answer and intervening petition of said E. M. Pattison, and ordering that the barrels of whiskey claimed by said E. M. Pattison as pledged be held in the possession of said Trustees and be administered by them free of all claim or lien of the said E. M. Pattison.

Said petition for review upon argument by counsel was submitted to the Court, who, being fully advised in the premises, does find that there is no error in the judgment and order of the Referee in sustaining said demurrer and making the order thereunder, and does therefore approve and confirm same.

It is therefore ordered and decreed that the whiskey claimed by said E. M. Pattison be held in the possession of the said
36 Trustees of David Rohrer and be administered by them free of any lien or claim of E. M. Pattison in accordance with the former order of the Referee.

No. —. U. S. Circuit Court of Appeals, Sixth Circuit. In the Matter of David Rohrer, a Bankrupt. Petition of Edward M. Pattison for Review. Filed Apr. 11, 1911, Frank O. Loveland, Clerk. Healy, Ferris & McAvoy, Att'ys for Edward M. Pattison.

Petition for Adjudication. Filed November 5, 1909.

Creditors' Petition.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. —. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

To the Honorable A. C. Thompson, Judge of the District Court of the United States for the Southern District of Ohio, Western Division:

The petition of Benjamin M. Stiver, John A. Stiver, Leora Stiver and Ann Maria Stiver, all of Germantown, Montgomery County, Ohio, respectfully shows:

That David Rohrer of Germantown, Montgomery County, Ohio, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, and resided, and had his domicile at Germantown, in the County of Montgomery and State and District aforesaid, and owes debts to the amount of $1,000.00; that his principal business is Distiller and the sale and disposal of the product thereof.

That your petitioners are creditors of said David Rohrer, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500.00. That the nature and amount of your petitioners' claims are as follows:

The claims of said Benjamin M. Stiver against David Rohrer are founded upon the following described promissory notes, given for borrowed money, to-wit:

1st. Note signed by said David Rohrer and one John H. Rohrer, and payable to said Benjamin M. Stiver, dated April 2, 1898, for the payment of Twenty-two Hundred ($2,200.00) dollars in eight months after date, at six per cent interest, copy of which, with all endorsements is hereto attached marked Exhibit "A." The interest on said note has been paid up to April 2, 1907.

2nd. Note signed by said David Rohrer and one John Rohrer, and payable to said Benjamin M. Stiver, dated March 22, 1899, for the payment of Twenty-two Hundred ($2,200.00) dollars in one year after date, with six per cent interest thereon from date.
37 The interest has been paid on said note upon to March 22, 1907. Copy of said note with all endorsements thereon is hereto attached marked Exhibit "B."

3rd. Note signed by said David Rohrer and one John H. Rohrer, and payable to said Benjamin M. Stiver, dated April 22, 1899, for the payment of Fifteen Hundred ($1,500.00) dollars in six months after date with six per cent interest from date. The interest on said note has been paid up to April 22, 1907. Copy of which with all endorsements thereon is hereto attached marked Exhibit "C."

4th. Note signed by said David Rohrer and payable to Benjamin

M. Stiver, dated April 8, 1902, for the payment of Thirteen Hundred ($1,300.00) dollars in one day after date, with six per cent interest from date. The interest on said note has been paid up to April 8, 1907. A copy of said note with all endorsements thereon is hereto attached marked Exhibit "D."

The claims of the said John A. Stiver against said David Rohrer are for borrowed money, and are founded upon the following described promissory notes, executed by the said David Rohrer to said John A. Stiver, to-wit:

1st. Note bearing date June 18, 1902, for the payment of Six Hundred ($600.00) dollars, in four months after date with six per cent interest from date. The interest thereon being paid to June 18, 1907. A copy of said note with all endorsements thereon is hereto attached marked Exhibit "E."

2nd. Note bearing date April 2, 1904, for the payment of Four Hundred ($400.00) dollars in one day after — with six per cent interest from date. The interest on said note is paid to April 2, 1908. A copy of said note, with all endorsements thereon, is hereto attached marked Exhibit "F."

The claim of the said Leora Stiver against the said David Rohrer is for borrowed money, and is founded upon the following described promissory note, executed by said David Rohrer to said Leora Stiver, to-wit:

Note dated September 28, 1901, for the payment of Seven Hundred ($700.00) dollars in six months after date, with seven per cent interest from date. The interest has been paid to September 28, 1907. A copy of said note with all endorsements thereon is hereto attached marked "Exhibit G."

The claim of said Ann Maria Stiver against said David Rohrer is for borrowed money, and is founded upon the following
38 described promissory note, executed by the said David Rohrer and one John H. Rohrer to said Ann Maria Stiver, to-wit:

Note dated February 25, 1899, for the payment of Thirteen Hundred and Fifty ($1,350.00) dollars, in six months after date, with six per cent interest from date. The interest on said note has been paid up to February 25, 1909. A true copy of said note, with all endorsements thereon, is hereto attached marked Exhibit "H."

And your petitioners further represent that said David Rohrer is insolvent, and that within four months next preceding the date of this petition the said David Rohrer committed several acts of bankruptcy, in that he has made the following transfers of his property, with intent to prefer certain creditors over his other creditors, to the following persons and in the manner and particulars, to-wit:

First. He has executed and delivered on October 29, 1909, his forty warehouse receipts to The Dayton National Bank of Dayton, Ohio, each pledging five barrels of whiskey, and which warehouse receipts have been filed as chattel mortgages in the Recorder's Office of Montgomery County, Ohio, on the said October 29, 1909, and are numbered from 47,277 to 27,356 both inclusive in the records

of said office, and for the purpose of securing payment to said Bank of the sum of $3,557.75.

Second. That on April 3, 1909, he executed and delivered to the First National Bank of Miamisburg, a chattel Mortgage on certain whiskey in his warehouse, to secure the payment of $600.00, and which was filed in the Recorder's office of Montgomery County, Ohio, on November 1, 1909.

Third. That on November 2, 1909, he executed and delivered to The First National Bank of Cincinnati, Ohio, a chattel mortgage on certain whiskey in his warehouse to secure the payment of $12,997.00, and which was filed in the Recorder's Office of Montgomery County, Ohio, on November 2, 1909.

Fourth. That on August 11, 1909, the said David Rohrer executed and delivered his mortgage on certain real estate belonging to him in Montgomery County, Ohio, to one George H. Edwards, to secure the payment of $12,400.00, and which mortgage was filed with the Recorder of Montgomery County, Ohio, on August 11, 1909, at 2:40 o'clock P. M.

Fifth. That on July 22, 1909, the said David Rohrer executed and delivered his mortgage on certain real estate belonging to him in Montgomery County, Ohio, to one John H. Rohrer, to
39 secure the payment of $5,200.00, and which mortgage was filed with the recorder of Montgomery County, Ohio, on July 22, 1909, at 2:50 o'clock P. M.; and,

Sixth. That on July 6, 1909, the said David Rohrer executed and delivered his mortgage on certain real estate belonging to him in Montgomery County, Ohio, to The First National Bank of Cincinnati, Ohio, to secure the payment of $12,700.00, and which mortgage was filed with the Recorder of Montgomery County, Ohio, on July 6, 1909, at 9:20 o'clock A. M.

Further, the said David Rohrer has committed the following acts of bankruptcy, in this, that he has suffered and permitted, while insolvent, the following named creditors of his to obtain through legal proceedings, and not having within five days before a sale or final disposition of any property affected by such preference, vacated or discharged said preferences, namely:

First. The Dayton National Bank of Dayton, Ohio, on October 25, 1909, obtained a judgment against said David Rohrer and one John H. Rohrer, in the Common Pleas Court of Montgomery County, Ohio, in Case No. 30,772 on the docket of said Court, for the sum of $3,557.75 and costs.

Second. James W. Eby, on October 26, 1909, obtained a judgment against said David Rohrer in the Common Pleas Court of Montgomery County, Ohio, in Case No. 30,627 on the docket of said court, for the sum of $6,310.42 and costs.

Third. The Farmers and Citizens Savings Bank of Germantown, Ohio, on July 15, 1909, obtained a judgment against said David Rohrer, John H. Rohrer and E. I. Antram, in the Common Pleas Court of Montgomery County, Ohio, in Case No. — on the docket of said Court, for the sum of $5,109.04 and costs.

Fourth. Grizzell Liggett on October 26, 1909, obtained a judgment against David Rohrer in the Common Pleas Court of Mont-

gomery County, Ohio, in Case No. 30,546 on the docket of said Court, for the sum of $2,757.76 and costs.

Fifth. The First National Bank of Miamisburg, Ohio, on October 25, 1909, obtained a judgment against the said David Rohrer and John H. Rohrer, in the Common Pleas Court of Montgomery County, Ohio, in Case No. 30,525 on the docket of said Court, for the sum of $6,296.23 and costs.

Sixth. N. J. Catrow on October 25, 1909, obtained a judgment against the said David Rohrer and John H. Rohrer in the
40 common Pleas Court of Montgomery County, Ohio, in Case No. 30,524 on the docket of said Court, for the sum of $2,072.88 and costs.

Seventh. The Merchants National Bank of Cincinnati, Ohio, on October 24, 1909, obtained a judgment against the said David Rohrer and John H. Rohrer in the Common Pleas Court of Montgomery County, Ohio, in Case No. 30,520 on the docket of said Court, for the sum of $8,686.00.

Further, the said David Rohrer has committed the further act of bankruptcy, in this, that the said David Rohrer on October 30, 1909, made a general assignment for the benefit of his creditors, and which Deed of Assignment he caused to be filed in the Office of the Probate Court of Montgomery County, Ohio.

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon David Rohrer as provided in the Acts of Congress relating to Bankruptcy, and that he may be adjudged to be a bankrupt within the purview of said acts.

BENJAMIN M. STIVER,
JOHN A. STIVER,
BENJAMIN M. STIVER,
JOHN A. STIVER,
LEORA STIVER AND
ANN MARIA STIVER,
By ROWE, SHUEY, MATTHEWS & JAMES, *Their Attorneys.*

UNITED STATES OF AMERICA,
Southern District of Ohio, Montgomery County, ss:

Benjamin M. Stiver and John A. Stiver, being first duly sworn, say that they are two of the petitioners above named, and that the statements contained in the foregoing petition subscribed by them are true.

BENJAMIN M. STIVER.
JOHN A. STIVER.

Sworn to and subscribed before me by the said Benjamin M. Stiver and John A. Stiver this November 5th, 1909.

[SEAL.] JOHN B. HARSHMAN,
Notary Public in and for Montgomery County, Ohio.

Notary fee 40c.

UNITED STATES OF AMERICA,
Southern District of Ohio, Montgomery County, ss:

John A. Stiver, being first duly sworn, says that he is the agent for Leora Stiver and Ann Maria Stiver, two of the petitioners above named in all matters recited in and relating to the said peti-
41 tion that the facts stated therein in relation to the claims of Leora Stiver and Ann Maria Stiver are within his personal knowledge, and that the other matters contained in said petition he has been informed from reliable information from records, and that he believes that the facts and statements made in the foregoing petition to be true.

JOHN A. STIVER.

Sworn to and subscribed by the said John A. Stiver before me this November 5th, 1909.

[SEAL.] JOHN B. HARSHMAN,
Notary Public in and for Montgomery County, Ohio.

40c. Notary fee.

UNITED STATES OF AMERICA,
Southern District of Ohio, Montgomery County, ss:

Webster W. Shuey being first duly sworn says that he is a member of the firm of Rowe, Shuey, Matthews and James who are the attorneys for each and all of the petitioners in the foregoing petition; that he is an attorney at law of the Supreme Court of the State of Ohio and of the United States District, Circuit and Circuit Court of Appeals of the Southern District of Ohio, and that the said firm and affiant are the duly authorized attorneys and agents of said Leora Stiver and Ann Maria Stiver in the above proceeding, and of all matters recited in and relating to the said petition; that he has prepared and read the foregoing petition and knows the contents thereof and that the facts stated therein are true; that the sources of his information and the grounds of his belief are among other things, examination of the original notes recited in said petition, and from a personal examination of the records in the Recorder's Office, Probate and Common Pleas Courts of Montgomery County, Ohio, referred to in said petition, and from other information received from two of the petitioning creditors, and further that he has full authority from the said petitioning creditors, who have verified this petition and *have* authority from them to make the affidavit.

WEBSTER W. SHUEY.

Sworn to and subscribed before me by Webster W. Shuey this November 5th, 1909.

[SEAL.] JOHN B. HARSHMAN,
Notary Public in and for Montgomery County, Ohio.

Notary fee 40c.

42 "A."

Exhibits Referred to in Petition.

Copies Thereof.

$2,200.00. GERMANTOWN, O., *April* 2, 1898.

Eight months after date I promise to pay to the order of B. M. Stiver two thousand and two hundred dollars payable at —— with 6 per cent interest from date. Value received.

DAVID ROHRER.
JNO. H. ROHRER.

Interest paid to April 2nd, 1899, $132.00.
Int. paid to April 2nd, 1900,
Int. paid to April 2nd, 1901,
Int. paid to April 2nd, 1902,
Int. paid to April 2nd, 1903,
Int. paid to April 2nd, 1904,
Int. paid to April 2nd, 1905,
Int. paid to April 2nd, 1906,
Int. paid to April 2nd, 1907.

"B."

$2,200.00. GERMANTOWN, O., *March* 22, 1899.

One year after date I promise to pay to the order of B. M. Stiver Twenty-two hundred Dollars payable at —— with six per cent interest from date. Value received.

DAVID ROHRER.
JNO. H. ROHRER.

(Revenue stamps 44 cts.)

Pain int. on the within note for one year April 18, 1900.
Paid int. on the within note for one year April 16th, 1901.
Int. paid to March 22nd, 1902,
Int. paid to March 22nd, 1903,
Int. paid to March 22nd, 1904,
Int. paid to March 22nd, 1905,
Int. paid to March 22nd, 1906,
Int. paid to March 22nd, 1907.

"C."

$1,500.00. GERMANTOWN, O., *April* 22*nd*, 1899.

Six months after date we promise to pay to the order of Ben M. Stiver Fifteen hundred Dollars payable at —— with six per cent int. Value received.

DAVID ROHRER.
JNO. H. ROHRER.

(Revenue stamps 30 cents.)

Int. paid on the within note for one year April 18, 1900.
Int. paid to April 22nd, 1901, April 16th, 1901,
13 Int. paid to April 22nd, 1902,
Int. paid to April 22nd, 1903,
Int. paid to April 22nd, 1904,
Int. paid to April 22nd, 1905,
Int. paid to April 22nd, 1906,
Int. paid to April 22nd, 1907.

"D."

$1,300.00. GERMANTOWN, O., *April 8th*, 1902.

One day after date I promise to pay to the order of Ben M. Stiver One thousand three hundred Dollars with 6 per cent int. payable at ——. Value received.

DAVID ROHRER.

Int. paid to April 8th, 1903,
Int. paid to April 8th, 1904,
Int. paid to April 8th, 1905,
Int. paid to April 8th, 1906,
Int. paid to April 8th, 1907.

"E."

$600.00. GERMANTOWN, O., *Jan. 18th*, 1902.

Four months after date I promise to pay to the order of John A. Stiver Six Hundred Dollars payable at —— with six per cent int. Value received.

DAVID ROHRER.

Paid int. to June 18th, 1903,
Paid int. to June 18th, 1904,
Paid int. for one year Nov. 21, 1905.
Paid int. for one year Nov. 6th, 1906,
Paid int. for one year Aug. 31st, 1907.

"F."

$400.00. GERMANTOWN, *April 2nd*, 1904.

One day after date I promise to pay to the order of John A. Stiver Four Hundred Dollars with 6 per cent int. Value received.

DAVID ROHRER.

Rec. int. on the within note for one year Oct. 24th, 1905,
Paid int. for one year Oct. 6th, 1906,
Paid int. for one year July 14th, 1907,
Paid int. for one year July 8th, 1908.

"G."

GERMANTOWN, O., *Sept. 28th*, 1901.

Six months after date I promise to pay to the order of Leora Stiver Seven Hundred Dollars payable at —— with 7 per cent in. Value received.

DAVID ROHRER.

44 Rec. int. on the within note for one year Oct. 7th, 1902,
Rec. int. on the within note for one year Sept. 28th, 1903,
Rec. int. on the within note for one year Oct. 6th, 1904,
Rec. int. on the within note for one year Sept. 28th, 1905,
Rec. int. on the within note for one year Oct. 4th, 1906,
Rec. int. on the within note for one year Oct. 5th, 1907,
Paid int. on the within note for one year $49.00 Oct. 20th, 1908.

"H."

$1,350.00. GERMANTOWN, *Feb. 25th*, 1899.

Six months after date we promise to pay to the order of Ann Maria Stiver One Thousand three hundred and fifty Dollars payable at —— with six per cent interest. Value received.

DAVID ROHRER.
JNO. H. ROHRER.

Revenue stamps 28 cents.

Interest paid for six months Sept. 16th, 1899, $40.56,
Interest paid for six months $40.56 Mch. 31st, 1900.
Interest paid for six months $40.50 Oct. 27, 1900.
Interest paid for six months $40.50 Mch. 29th, 1901.
Interest paid for six months $40.50 Oct. 22nd, 1901.
Interest paid on the within note for 6 months $40.50 April 12th, 1902,
Interest paid for one year $81.00 Mch. 18th, 1903,
Interest paid for one year $81.00 April 7th, 1904.
Interest paid for one year $81.00 March 16th, 1905.
$81.00 int. paid for one year June 1st, 1906,
$81.00 int. paid for one year Mch. 14th, 1907,
$81.00 int. paid for one year May 8th, 1908.

Answer of David Rohrer. Filed November 15, 1909.

United States District Court in and for the Southern District of Ohio, Western Division.

In the Matter of DAVID ROHRER, Bankrupt.

Answer of David Rohrer.

And now comes David Rohrer, and admits having been duly served with the Writ of Subpœna in the above entitled pro-

45 ceeding, and voluntarily enters his appearance herein, and he waives the time for answer, and files this his answer to said petition. He admits the truth of the allegations of the petition filed against him, and he waives the trial by jury, and consents and prays he may be adjudicated a bankrupt under the Acts of Congress of the United States.

DAVID ROHRER.

DALE & KUSWORM,
Counsel for David Rohrer.

UNITED STATES OF AMERICA,
Southern District of Ohio, Montgomery County, ss:

David Rohrer being first duly sworn says, that he is the person against whom this proceeding is brought to declare him a bankrupt, and that the facts stated in his foregoing answer are true.

DAVID ROHRER.

Sworn to before me by the said David Rohrer, and by him signed in my presence this 11th day of November, 1909.

[SEAL.] WILLIAM M. MATTHEWS,
Notary Public in and for Montgomery County, Ohio.

Order of Adjudication. Entered November 15, 1909.

In the Matter of DAVID ROHRER, Bankrupt.

At Cincinnati, Ohio, in said District on the 15th day of November, A. D. 1909, before the Honorable John E. Sater, Judge of said Court in bankruptcy, the petition of Benjamin M. Stiver, et al., that David Rohrer be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy having — heard and duly considered the said David Rohrer is hereby declared and adjudged bankrupt accordingly.

Order of Reference. Entered November 15, 1909.

No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

Whereas, David Rohrer, of Germantown, Ohio, in the County of Montgomery and District aforesaid on the 15th day of November, A. D. 1909, was duly adjudged a bankrupt upon a petition filed in this Court against him on the 5th day of November, A. D. 1909, according to the provisions of the Acts of Congress relating to Bankruptcy.

46 It is thereupon ordered that said matter be referred to William S. McConnaughey of the County of Montgomery and State of Ohio one of the Referees in Bankruptcy of this Court to take such further proceedings therein as are required by said Acts

and that the said David Rohrer shall attend before the said Referee forthwith at Dayton, Ohio, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

Order Appointing Trustees.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

Appointment of Trustees by Creditors.

At Dayton, in said District, on the 21st day of December, A. D. 1909, before W. S. McConnaughey, Referee in Bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the Dayton Daily Journal, we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint Chas. W. Dale, of Dayton, O., Edward Rott, and Henry Ampt of Germantown, in the County of Montgomery and State of Ohio, to be the trustee- of the said bankrupt's estate and effects, and fix their bond at the sum of $35,000 each if they give separate bond and at $50,000.00 if they give a joint bond.

John A. Stiver, Farmersville, Ohio	$1,000.00	& Int.
Leola Stiver, Germantown, Ohio	700.00	"
Ann Marie Stiver, Germantown, Ohio	1,350.00	"
Benj. M. Stiver, Germantown, Ohio	7,200.00	"
Grey, Dolle & Latta, Cincinnati, Ohio	107.19	
Rowe, Shuey, Matthews & James, Dayton, Ohio	250.00	
Ohio & Mutual Insurance Co., Salem, O	1.30	
Edward Kindig, Germantown, Ohio	10,000.00	"
Edward Kindig, Germantown, Ohio	113.07	"
Geo. P. Bailey & Bro., Germantown, Ohio	277.55	"
W. S. Zeller, Germantown, Ohio	4,000.00	"
Jas. K. Smith, Germantown, Ohio	2,500.00	"
Jacob Goss, Germantown, Ohio	610.00	"
47 Germantown Encampment No. 74 I. O. O. F., Germantown, Ohio	929.00	"
Germantown Encampment No. 74 I. O. O. F., Germantown, Ohio	1,499.75	"
Julia K. Donnellson, Germantown, Ohio	2,000.00	"
C. K. Smith, Germantown, Ohio	700.00	"
David Flinspach, Germantown, Ohio	18.50	"
Adam Frank, Germantown, Ohio	260.00	"
Geo. A. Coleman, Germantown, Ohio	300.00	"

Ellsworth Laughlin, Germantown, Ohio	21.83	"
J. A. Hildabolt & Bro., Germantown, Ohio	29.22	"
U. Engleman, Miamisburg, Ohio	153.21	"
Isaac E. Schaeffers Admr. Schaeffer	267.75	"
Kate Smith, Germantown, Ohio	500.00	"
John O. Eshelman, Germantown, Ohio	500.00	"
L. S. Kurtz, Germantown, Ohio	35.00	"
C. S. Kurtz, Germantown, Ohio	224.55	"
Sarah Boore, Germantown, Ohio	100.00	"
W. H. Boore, N. M. H. Dayton, Ohio	400.00	"
Chas. E. Stiver, Germantown, Ohio	300.00	"
Lizzie Catrow, Germantown, Ohio	430.00	"
Lightcap & Avery, Germantown, Ohio	54.05	"
C. A. Lightcap, Germantown, Ohio	42.85	"
Banker & Co., Germantown, O	102.58	"
Henry Kinkle, Germantown, Ohio	1,405.20	"
Katherine E. Cohr, Farmersville, Ohio	700.00	"
The Hayes Lithographing Co., Buffalo, N. Y.	130.00	"
The City National Bank, Dayton, Ohio	1,000.00	"
George W. Houk, Farmersville, Ohio	3,141.60	
By Webster W. Shuey, their attorney-in-fact.		
Ullerik Shauk Diering	500.00	
Ida B. Cosler	100.00	
By C. A. Femklauser, their att'y-in-fact.		
A. E. Emrich, Germantown, Ohio	296.68 & Int.	
The Teutonia National Bank, Dayton, Ohio	1,200.00	"
C. E. Riley, Dayton, Ohio	90.00	
Josephine S. Greble, Dayton, Ohio	1,000.00	"
John H. Rohrer & Co., Germantown, Ohio	14,727.39	"
Josephine S. Byers, Shelbyville, Ind	8,276.26	"
Dale & Kushworm, Dayton, Ohio	697.90	"
Elizabeth Kaucher, Yankton, S. Dak	10,632.70	"
Charles W. Dale, Dayton, Ohio	850.00	"
A. M. Dechant, Germantown, Ohio	1,100.00	"
Aaron Pressler, Germantown, Ohio	60.00	"
J. A. Coe, Dayton, Ohio	33.29	"
C. W. Shimp, Germantown, Ohio	480.00	"
By Charles E. Gardener, their attorney-in-fact.		
Charles E. Gardener, Dayton, Ohio	1,400.00	"
By Chas. E. Gardener.		

The foregoing appointment is hereby approved.

W. S. McCONNAUGHEY, *Referee.*

In the District Court of the United States in and for the Southern District of Ohio, Western Division.

No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

Application.

Rowe, Shuey, Matthews and James, Charles E. Swadener, Attorneys for Trustees.

A true copy of application filed on December 30, 1909.
W. S. McCONNAUGHEY, *Referee.*

In the District Court of the United States in and for the Southern District of Ohio, Western Division.

No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

Application.

To the Honorable A. C. Thompson, District Judge:

And now comes Charles W. Dale, Edward Rott, and Henry Ampt, Trustees of David Rohrer, having been heretofore elected and qualified, and now acting as such Trustees, and respectfully represent and show to the Court,

First. That for many years prior to the filing of the petition herein for the adjudication of the said David Rohrer, a bankrupt, the said David Rohrer had been engaged in the business of distilling of Bourbon and Rye Whiskies at his distillery located near the village of Germantown, Montgomery County, Ohio, and that as a part of his plant and distillery he had in connection therewith, at the time of his adjudication, four separate buildings in which he stored the said whisky as it was manufactured.

Second. That he stored said whisky, as made in said buildings for the purpose of improving it by age, and until he sold and disposed of same, and until the tax thereon, levied by the Government, was paid.

Third. That said buildings were not used for the storage of any whiskies other than the whiskies manufactured by said David
49 Rohrer, nor other merchandise or thing, the property of said David Rohrer, or of any other person.

Fourth. That at the time of the filing of the petition for the adjudication of said David Rohrer, a bankrupt, and at the time of the appointment and qualification of these Trustees, there were stored in three of the four buildings used for storage purposes, 9,849 barrels of bourbon and rye whiskies, which, before that time, from time to

time, as made, had been placed therein for the purposes aforesaid, and that said whiskies passed to said Trustees upon their appointment and into their possession, and they now hold same, except thirty-two barrels of rye whisky, sold by the Receiver herein, under order of this Court. A full and detailed statement of said barrels, the date of manufacture, and the serial numbers of the barrels or packages are shown in exhibits hereto attached marked Exhibits "A" and "B."

Fifth. That the following named persons, with their places of residence, respectively, claim to have some interest in parts and parcels of said whiskies, claiming to have bought same. The number of barrels so claimed to have been bought, with the serial numbers of the barrels, are given in said Exhibit "A" hereto attached.

The names and residences of said parties are as follows:

The Weidemann Company, Cleveland, Ohio.
Wm. C. Biles Company, Cincinnati, Ohio.
Frank Mueller, Middletown, Ohio.
J. G. Mader & Sons, Bucyrus, Ohio.
Otto Wagner & Bro., Tiffin, Ohio.
The Hossfeld & Son Company, Hamilton, Ohio.
Hugh McIlvain, Cincinnati, Ohio.
Detrick Distilling Company, Tippecanoe City, Ohio.
Republic Distributing Company, Cincinnati, Ohio.
Geo. F. Baker, Dayton, Ohio.
Beech Hill Dist. Company, Cincinnati, Ohio.
The Frank G. Tulledge Company, Cincinnati, Ohio.
Jos. Silverman & Company, Cincinnati, Ohio.
The Oneal Parker Company, Covington, Ohio.
The National Dist. Company, Cincinnati, Ohio.
Virginia Carolina Grocery Company, Richmond, Va.
Geo. M. Graves & Sons, Dayton, Ohio.
The Geo. Biles Company, Cincinnati, Ohio.
Chas. W. Sander, Dayton, Ohio.
Ulman Emstein Company, Cleveland, Ohio.
Nexter & Company, Memphis, Tenn.
The Albert M. Gugenheim Company, Cincinnati, Ohio.
Fred Kette Sons Company, Dayton, Ohio.
50 Dayton Club, Dayton, Ohio.
Louis Poock, Cincinnati, Ohio.
L. Weiskopf, Cincinnati, Ohio.
Turner Dist. Company, Cincinnati, Ohio.
Richard & Company, Washington, D. C.
Schauer Dist. Company, Dayton, Ohio.
Sol. Rauh & Sons Company, Dayton, Ohio.
T. F. Creighton, Manitou, Colo.
Max Fruhauf Company, Cincinnati, Ohio.
S. N. Weil & Company, Cincinnati, Ohio.
C. Sandheger Company, Cincinnati, Ohio.
The Weidemann Company, Cleveland, Ohio.
M. Durner & Company, Cincinnati, Ohio.
Mountain Dist. Company, Cincinnati, Ohio.

William C. Biles Company, Cincinnati, Ohio.
Weideman Freis Company, Cleveland, Ohio.
The John Deis Company, Dayton, Ohio.
Hulman & Company, Terre Haute, Ind.
C. Sunstein & Sons, Pittsburgh, Pa.
M. Dernham & Son, Cincinnati, Ohio.
Peter Weber & Company, Middletown, Ohio.
I. Trager & Company, Cincinnati, Ohio.
S. T. Patterson, Dayton, Ohio.

Sixth. That the following persons, with the places of residence of each, respectively, claim to have bought of some of the above named parties parts of their respective holdings.

Their names and residences are as follows:

J. and A. Freiberg, Cincinnati, Ohio.
Max Ehrman, Chicago, Ill.
The J. W. Biles Company, Cincinnati, Ohio.
John W. Cherry, Danville, Ill.
C. F. Weckesser, Mt. Vernon, Ind.
The Theobald & Son Company, Columbus, Ohio.
Harry F. Whitney, Cincinnati, Ohio.
Bernheim Rextinger & Company, Cincinnati, Ohio.
Harry F. Hopkins, Cincinnati, Ohio.
Peter Borntrager, Miamisburg, Ohio.
Thos. A. Sullivan, 122-124 Pearl St., Cincinnati, Ohio.
Fred C. Olt, Dayton, Ohio.
Charles E. Becker, Phillipsburg, Ohio.
George H. Goodman & Co., Cairo, Ill.
F. A. Weymouth, Huntington, W. Va.
Charles Schmidt, Milan, Mich.
John Winkelman, Ottoville, Ohio.
S. M. Beck, Miamisburg, Ohio.
Theodore Young, Miamisburg, Ohio.
August Kothman, Burkettsville, Ohio.
51 J. C. Hansen, Dayton, Ohio.
Mike Kastl, Dayton, Ohio.
George Kinzler & Co., Dayton, Ohio.
Bott & Cannon Co., Columbus, Ohio.
J. J. Hittemiller, Dyersville, Iowa.
Sam. Hemple, Lorain, Ohio.
Ben. Vogelsong, Loramie, Ohio.
Wm. Neubrander, Excello, Ohio.
E. A. Bergman & Co., Chicago, Ill.
W. E. Wahler, Deshler, Ohio.
Ernest Oetterer, Middletown, Ohio.
Joseph G. Bachman, Akron, Ohio.
Lung, Schenck & Co., Columbus, Ohio.
Frank Baumgartner, Galion, Ohio.
T. C. McCarthy, Denison, Iowa.
Curl Waltersdorf, Creston, Iowa.
J. A. Blake, Huntington, W. Va.
Julius Bachman, Middletown, Ohio.

Sheets & Bush, Botkins, Ohio.
J. A. Bertocci, Richmond, Va.
Meadows and Swan, Huntington, W. Va.
N. P. Seeger, Middletown, Ohio.
E. C. Braun, Cincinnati, Ohio.
Cal. Tucker, Cincinnati, Ohio.
Nick Nelson, Sioux City, Iowa.
Lipman & Co., Cincinnati, Ohio.
Moriconi & Corrieri, Richmond, Va.
William J. Barry, Middletown, Ohio.
Cooperative Distilling Co., Cincinnati, Ohio.
Mary Theurkauf, Cincinnati, Ohio.
Robert McLain, Middletown, Ohio.
George Lubberger, Middletown, Ohio.
J. Munch & Son, Toledo, Ohio.
Marchetti & Grovannetti, Richmond, Va.
M. E. Temmen, Middletown, Ohio.
C. D. Meloy, Lebanon, Ohio.
John Doner, Toledo, Ohio.
John P. Scheidt & Co., Freeport, Ill.
Hartman Bros., Detroit, Mich.
Henry Pflautz, Crescentsville, Ohio.
D. H. Maynes, 301 Morris St., Toledo, Ohio.
Louis Giovanetti, 1619 E. Broad St., Richmond, Va.
F. B. Speakman & Sons, New Bremen, Ohio.
Samuel Streit & Co., New York City.
Clem Backlage, Newport, Ky.
John Gardner, Cincinnati, Ohio.
Thos. A. Sullivan & Co., Cincinnati, Ohio.
J. Rapacinski, Chicago, Ill.
52 T. C. Power & Bro., Fort Benton, Montana.
Fred C. Seip, Lake Zurich, Ill.
Michael Julg, Reading, Ohio.
Peter Neu, Monroe, Ohio.
Fred Frey, Middletown, Ohio.
Margaret Kilsch, Erie, Pa.
I. T. Keywood, St. Joseph, Mo.
W. H. Pitthan, St. Joseph, Mo.
Y. N. Goodbread Estate, Nevada, Ohio.
D. Spielmann & Co., Dyersville, Iowa.

Seventh. That the following named persons, with their places of residence, respectively, claim to have some interest in parts and parcels of said whiskies, who claim to have loaned and advanced money to said David Rohrer, and that certain whiskies were pledged and hypothecated to them respectively, either at the time of said loan or thereafter. The numbers of the packages and barrels so claimed to be pledged and hypothecated and to whom, are unknown in part to the Trustees, but the names and residences of such as are known to the Trustees are as follows:

John White, Cincinnati, Ohio.
J. F. Sadler & Company, Cincinnati, Ohio.
Harry S. Patterson, Cincinnati, Ohio.
Daniel R. Schaeffer, Dayton, Ohio.
Shields & Company, Cincinnati, Ohio.
First National Bank, Elmwood Place, Ohio.
Fourth National Bank, Cincinnati, Ohio.
F. Burkhardt Estate, Cincinnati, Ohio.
Queen City Savings Bank & Trust Company, Cincinnati, Ohio.
Merchants National Bank, Cincinnati, Ohio.
Black & Company, Cincinnati, Ohio.
First National Bank, Miamisburg, Ohio.
First National Bank, Cincinnati, Ohio.
L. Weiskopf, Cincinnati, Ohio.
Dayton National Bank, Dayton, Ohio.
A. Beckert, Cincinnati, Ohio.
The Pearl Street Market Bank, Cincinnati, Ohio.
Merchants National Bank, Dayton, Ohio.
George Baker, Dayton, Ohio.
The Sol. Rauh & Sons Company, Dayton, Ohio.
Samuel Umbenhauer, Miamisburg, Ohio.
H. Heidersfield, Cincinnati, Ohio.
E. M. Patterson, Cincinnati, Ohio.
Fredericka A. Shields, Cincinnati, Ohio.
Abe Block, Cincinnati, Ohio.
Stephen J. Patterson, Dayton, Ohio.
Charles F. Hofer, Cincinnati, Ohio.

53 Eighth. That said entire number of barrels of whiskey have all the time been in the actual and exclusive possession and control, from and after its manufacture and deposit in said storehouses, in the said David Rohrer, and of his assignees after he made an assignment under the insolvency laws of the State of Ohio, and then of his Receiver in Bankruptcy, and now of his Trustees in Bankruptcy; that said whisky was never delivered to the said several parties named in the fifth, sixth and seventh paragraphs above, nor have they ever at any time had possession thereof, and that no right or title therein ever passed to, or vested in them, or either of them.

Ninth. That said Exhibits "A" and "B" contain and give the serial numbers of the barrels of whiskey now contained in the said store houses, together with the thirty-two barrels heretofore sold by the Receiver herein under order of this Court.

Tenth. That it is necessary, in order to settle the conflicting claims of the estate and of the various parties herein before named, to the said whiskies and parts thereof, that said persons be made parties hereto, and required to file herein their answers, setting up the nature and character of their respective claims and interests, whether they claim to have bought the whiskey claimed by them, and when, and the consideration paid, or agreed to be paid, and whether for a present or past consideration, and the number of barrels claimed, with their serial numbers; and that those who claim to have certain whiskies pledged and hypothecated to

them respectively, shall state the agreement of pledge with the consideration, whether past or present, and the amount, and the indebtedness claimed to be secured thereby, the date of the pledge, the number of barrels with the serial number of the same, and such other and further facts on which they found their respective claims.

Eleventh. And further, that in order to settle and close said estate and trust, it will be necessary, after the ascertainment and determination of the claims and rights of the various claimants and of the estate, to make sale of said whiskey in the manner provided by the Bankrupt Act.

Wherefore, The said Trustees pray that said above named persons herein before given may be made parties to this proceeding, and notified of this application, and the object and purpose thereof, in such manner as may be ordered by this Court; that the said several parties, and all others who claim to have any right or interest in any part or parcel of said whiskies hereinbefore described,
54 may be required to file herein his answer and cross-petition setting up fully the nature and character of his said claim, or claims, and demands in such manner as will fully apprise all parties herein of his claim, interest and demand, if any, and that on final hearing the rights and interests of all the parties may be fully and completely ascertained and determined, and upon final hearing for such findings, judgments and decrees and equitable relief as the Trustees and the various parties respectively may be entitled to in the premises and under the Bankruptcy Act; and for a sale of the said whiskies in the manner provided by the Bankruptcy Act.

CHARLES W. DALE,
EDWARD ROTT,
HENRY AMPT,
Trustees in Bankruptcy of David Rohrer.

ROWE, SHUEY, MATTHEWS & JAMES,
CHARLES E. SWADENER,
Attorneys for Trustees.

UNITED STATES OF AMERICA,
Southern District of Ohio,
Montgomery County, ss:

Charles W. Dale, being duly sworn, says that he is one of the Trustees of David Rohrer, Bankrupt, and that the facts stated in the foregoing application are true as he believes.

CHARLES W. DALE.

Sworn to before me and subscribed in my presence this thirteenth day of December, A. D. 1909.

CLEMENT R. GILMORE,
Notary Public in and for Montgomery County, Ohio.

Notary fee, 40 cents due.

EXHIBITS A AND B.

"EXHIBIT A."

The Weidemann Co., Cleveland, Ohio.

3 bbl. '06, No. 108068, 108073, 108088.
10 bbl. Feb. '06, No. 108104-108113.

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Wm. C. Biles Co., Cincinnati, Ohio.

17 bbl. June '05, No. 105557-573.
3 bbl. June '05, No. 105576-578.
19 bbl. June '05, No. 105580-598.
4 bbl. Feb. '06, No. 108250-253.
1 bbl. Apr. '06, No. 109888.
4 bbl. Nov. '06, No. 112836-839.

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Frank Mueller, Middletown, Ohio.

12 bbl. June '05 No. 106162-173.

J. G. Mader & Sons, Bucyrus, Ohio.

1 bbl. Mch. '06 No. 108458.

Otto Wagner & Bro., Tiffin, Ohio.

1 bbl. Apr. '06, No. 109923.

The C. Hossfeld & Son Co., Hamilton, Ohio.

19 bbl. Mch. '06, No. 108528, 108532-33, 108537-52.

Hugh McIlvain, Cincinnati, Ohio.

4 bbl. Apr, '06, No. 109925-928.

Detrick Distilling Co., Tippecanoe City, Ohio.

50 bbl. Mch. '06, No. 108464-513.
60 bbl. May '06, No. 109659-718.
50 bbl. June '06, No. 111745-794.
45 bbl. June '06, No. 111815-859.
15 bbl. June '06, No. 112199-213.
5 bbl. Feb. '07, No. 114717-721.

225

Republic Distributing Co., Cincinnati, Ohio.

35 bbl. June '06, No. 111942-976
15 bbl. June '06, No. 111982-996.
100 bbl. Nov. and Dec. '06, No. 112915-113014.

150

Geo. F. Baker, Dayton, Ohio.

19 bbl. Jan. '05, No. 100979-993, 100995-998.
2 bbl. Apr. '03, No. 97918-19.
2 bbl. June '03, No. 99550-51.
3 bbl. Mch. '05, No. 102671-673.
3 bbl. Mch. '05, No. 102691-93.
5 bbl. Apr. '05, No. 104079-83.
1 bbl. Apr. '05, No. 104228.
2 bbl. No. 104232-233, Apr. '05.
3 bbl. July '05, No. 106711-713.
35 bbl. Feb. '06, No. 107703-737.
12 bbl. Feb. '06, No. 107741-752.
1 bbl. Mch. '06, No. 109363.
13 bbl. Mch. and Apr. '06, No. 109371-383.
15 bbl. Apr. '06, No. 109389-403.
50 bbl. Apr. '06, No. 110063-112.
10 bbl. May '06, No. 110343-352.
9 bbl. May '06, No. 110359-367.
1 bbl. May '06, No. 110387.
50 bbl. May '06, No. 110505-554.
25 bbl. May '07, No. 117467-491.
56 bbl. May '07, No. 117496-551.
2 bbl. May '07, No. 117560-561.

319
56

Beech Hill Dist. Co., Cincinnati, Ohio.

44 bbl. July '06, No. 112299-342.
51 bbl. July '06, No. 112393-443.

95

The Frank G. Tulledge Co., Cincinnati, Ohio.

35 bbl. Feb. '06, No. 107768-802.
50 bbl. Jan. '07, No. 114415-464.

85

Jos. Silverman & Co., Cincinnati, Ohio.

1 bbl. Jan. '06, No. 111409.

The Oneal Parker Co., Covington, Ky.

85 bbl. Feb. '07, No. 114772-856.

The National Distributing Co., Cincinnati, Ohio.

15 bbl. Apr. '05, No. 103594-608.

Virginia Carolina Grocery Co., Richmond, Va.

3 bbl. Apr. '05, No. 103946-948.

Geo. M. Graves & Son, Dayton, Ohio.
10 bbl. May '05, No. 105074-083.

40 bbl. Feb. '07, No. 114932-971.
25 bbl. May '07, No. 117722-746.

75

The George Biles Co., Cincinnati, Ohio.
1 bbl. Apr. '06, No. 110012.
15 bbl. Dec. '06, No. 113050-064.

16

Chas. W. Sander, Dayton, Ohio.
2 bbl. Apr. '07, No. 117035-036.

Ulman Emstein Co., Cleveland, Ohio.
4 bbl. Apr. '07, No. 117103-106.

Nexter & Co., Memphis, Tenn.
80 bbl. Jan. '07, No. 113835-914.

S. J. Patterson, Dayton, Ohio.
100 bbl. Jan. '07, No. 116577-676.

The Albert M. Gugenheim Co., Cincinnati, Ohio.
5 bbl. Jan. '06, No. 110233-237.
6 bbl. May '06, No. 110307-312.
5 bbl. May '06, No. 110333-337.
50 bbl. May '06, No. 110735-784.
5 bbl. Jan. '07, No. 114470-474.
55 bbl. Apr. '07, No. 116706-716, 116719-721, 116727-751, 116756-771.

126

57

Fred Kette Sons Co., Dayton, Ohio.
5 bbl. Feb. '05, No. 101919-923.
11 bbl. Feb. '05, No. 102186-193, 102226-228.
2 bbl. Mch. '03, No. 97003-04.
1 bbl. Feb. '05, No. 102208.
1 bbl. Feb. '05, No. 102223.
2 bbl. Apr. '05, No. 103877-878.
8 bbl. Apr. '05, No. 104156-163.
15 bbl. May '05, No. 104544-558.
5 bbl. Feb. '06, No. 107623-627.

5 bbl. Feb. '06, No. 108314-318.
15 bbl. May '06, No. 110620-634.
20 bbl. June '06, No. 111795-814.
10 bbl. June and July '06, No. 112224-233.
15 bbl. July '06, No. 112274-288.
4 bbl. July '06, No. 112290-293.
10 bbl. Nov. '06, No. 112570-574, 112590-594.
1 bbl. Nov. '06, No. 112604.
25 bbl. Mch. '07, No. 116002-026.
60 bbl. June '07, No. 118572-631.

215

Dayton Club, Dayton, Ohio.
3 bbl. Feb. '05, No. 102361-363.

Louis Poock, Cincinnati, Ohio.
3 bbl. Mch. '03, No. 97234, 97239, 97409.
1 bbl. Mch. '05, No. 103393.

4

L. Weiskopf, Cincinnati, Ohio.
4 bbl. Feb. '05, No. 101813-812, 101817-818.

Turner Dist. Co., Cincinnati, Ohio.
25 bbl. June '03, No. 100027-051.
35 bbl. June '03, No. 100082-115.

Richard & Co., Washington, D. C.
3 bbl. Mch. '05, No. 102631-633.

Schauer Dist. Co., Dayton, Ohio.
10 bbl. Feb. '05, No. 102414-423.
3 bbl. Feb. '06, No. 107900-902.
100 bbl. Apr. '06, No. 109559-658.
5 bbl. Apr. '06, No. 109978-982.
5 bbl. May '06, No. 110595-599.
9 bbl. May '06, No. 110601-609.
100 bbl. May '06, No. 110635-734.
150 bbl. May '06, No. 111060-209.
10 bbl. May '06, No. 111215-224.
2 bbl. May '06, No. 111228-229.
250 bbl. June '06, No. 111495-744.

644

58

I. Trager Co., Cincinnati, Ohio.

10 bbl. June '03, No. 99771-780.
25 bbl. June '03, No. 99806-830.
100 bbl. Apr. '06, No. 109404-503.
30 bbl. June '06, No. 111305-334.
67 bbl. June '06, No. 111338-404.

232

Sol. Rauh & Sons Co., Dayton, Ohio.

15 bbl. Jan. '05, No. 101064-078.
70 bbl. Jan. '06, No. 106758-827.
10 bbl. Apr. '06, No. 109894-903.
70 bbl. Feb. '07, No. 114862-931.

165

T. F. Creighton, Manitou, Colo.

5 bbl. Jan. '05, No. 100879-883.
10 bbl. Feb. '06, No. 107903-907, 107909-913.

15

Max Fruhauf Co., Cincinnati, Ohio.

3 bbl. Apr. '03, No. 98177-179.

S. N. Weil & Co., Cincinnati, Ohio.

30 bbl. Jan. '05, No. 100919-938, 100944-953.
3 bbl. May '05, No. 104731-733.

33

C. Sandheger Co., Cincinnati, Ohio.

5 bbl. Apr. '03, No. 97540-544.
20 bbl. Apr. '03, No. 97565-584.
5 bbl. May '03, No. 98880-84.
5 bbl. May '03, No. 98955-59.
1 bbl. Jan. '05, No. 100838.
1 bbl. Mch. '05, No. 102873.
5 bbl. Mch. '05, No. 102894-898.
6 bbl. Mch. '05, No. 103013-018.
59 bbl. Jan. '06, No. 107063-112, 107114-122.
3 bbl. Jan. '06, No. 107125-127.
112 bbl. Jan. '06, No. 107141-252.
5 bbl. Jan. '06, No. 107273-277.
5 bbl. Jan. '06, No. 107298-302.
100 bbl. Jan. '06, No. 107403-502.
5 bbl. Jan. '06, No. 107538-542.
100 bbl. Mch. '06, No. 108554-653.
195 bbl. Mch. '06, No. 108659-853.
10 bbl. Mch. '06, No. 109014-023.

59

143 bbl. Mch. '06, No. 109056-198.
103 bbl. Mch. '06, No. 109201-303.
100 bbl. Nov. '06, No. 112635-734.
75 bbl. Nov. '06, No. 112760-835.
195 bbl. Dec. '06, No. 113120-314.
3 bbl. Feb. '07, No. 115254-256.
100 bbl. Feb. '07, No. 115277-376.
100 bbl. Mch. '07, No. 116027-126.
15 bbl. Mch. '07, No. 116167-181.
350 bbl. Mch. and Apr. '07, No. 116227-576.
1 bbl. Apr. '07, No. 117931.
26 bbl. Apr. '07, No. 116936-961.
13 bbl. Apr. '07, No. 116964-976.
45 bbl. Apr. '07, No. 116977-117021.

1911

Weidemann Co., Cleveland, Ohio.

15 bbl. Dec. '04, No. 100440-454.
5 bbl. Mch. '05, No. 102569-573.
11 bbl. July '05, No. 106478-488.

31

M. Durner & Co., Cincinnati, Ohio.

5 bbl. June '02, No. 94320-324.
13 bbl. Feb. '06, No. 107657, 107659-662, 107665-667, 107673-677.
5 bbl. Apr. '06, No. 109719-723.
2 bbl. May '06, No. 111058-59.
24 bbl. Jan. '07, No. 113935-944, 113946-959.
3 bbl. Feb. '07, No. 114699-701.
9 bbl. Feb. '07, No. 115388-396.
4 bbl. Feb. '07, No. 115523-526.

65

Mountain Dist. Co., Cincinnati, Ohio.

4 bbl. June '03, No. 100118-121.
5 bbl. Dec. '04, No. 100395-399.
7 bbl. Feb. '05, No. 102487-493.
4 bbl. Mch. '05, No. 102505-508.
1 bbl. Mch. '05, No. 102513.
5 bbl. Mch. '05, No. 102544-548.
10 bbl. May '05, No. 105139-143, 105149-153.
2 bbl. May '05, No. 105188-105193.
3 bbl. June '06, No. 111939-941.

41

Wm. C. Biles Co., Cincinnati, Ohio.
3 bbl. June '03, No. 99350-51-99361.
25 bbl. June '03, No. 99472-496.
25 bbl. Feb. '05, No. 102254-278.

60

5 bbl. May '03, No. 99205-209.
2 bbl. Dec. '04, No. 100568-569.

60

Weideman Freis Co., Cleveland, Ohio.
3 bbl. Jan. '07, No. 113927-929.

The John Deis Co., Dayton, Ohio.
14 bbl. Jan. '06, No. 106913-922, 106924-927
10 bbl. Feb. '06, No. 107628-637.
5 bbl. Apr. '06, No. 110173-177.
10 bbl. Jan. '07, No. 113915-924.
15 bbl. Jan. '07, No. 114375-389.
20 bbl. Feb. '07, No. 114677-696.
30 bbl. Feb. '07, No. 115532-561.
25 bbl. Apr. '07, No. 116787-811.
25 bbl. Apr. '07, No. 117062-086.

154

Hulman & Co., Terre Haute, Ind.
100 bbl. Jan. '06, No. 106928-107027.
30 bbl. Feb. '06, No. 107984-108013.
10 bbl. Feb. '06, No. 108024-033.
95 bbl. Jan. '07, No 114475-569.
60 bbl. Jan. '07, No. 114617-676.

295

C. Sunstein & Sons, Pittsburg, Pa.
15 bbl. Feb. '07, No. 115437-451.

The Peter Weber Co., Middletown, Ohio.
3 bbl. May '05, No. 105301-303.
2 bbl. May, '05, No. 105322-323.
2 bbl. May '05, No. 105327-328.
4 bbl. May '05, No. 105330-333.
10 bbl. June '06, No. 112214-223.
10 bbl. July '06, No. 112234-243.
3 bbl. July '06, No. 112246-248.
2 bbl. July '06, No. 112252-253.
18 bbl. July '06, No. 112256-273.

54

M. Dernham & Son, Cincinnati, Ohio.

10 bbl. June '05, No. 105444-453.
7 bbl. June '05, No. 105527-533.
7 bbl. May '06, No. 111245-251.
25 bbl. Feb. '07, No. 115462-486.

49

5538 bbl. Total.

61 "EXHIBIT B."

D. Rohrer, unsold and unpledged as we are informed.

15 bbl. Nov. '01, No. 88416-419, 88431-434, 88625-629.
19 bbl. Dec. '01, No. 88990-994, 89486-489, 89494-503.
1 bbl. Jan. '02, No. 89560.
3 bbl. Feb. '02, No. 90694, 91801, 91104.
30 bbl. June '02, No. 94440-444, 94455-468, 94485-490, 94630-634.
1 bbl. May '03, No. 99252.
2 bbl. June '03, No. 99392-100016.
8 bbl. July '03, No. 100357-364.
9 bbl. Dec. '04, No. 100383-384, 100417-419, 100775-778.
5 bbl. Jan. '05, No. 101159-163.
22 bbl. Feb. '05, No. 102288, 102339-356, 102364, 102177-178.
38 bbl. May and July '05, No. 104559-588, 104849-857, 105384-388.
72 bbl. June and July '05, No. 105514-515, 106224-253, 106269-308.
50 bbl. July '05, No. 106369-377, 106433-447, 106448-463, 106514, 106620-623, 106719, 106735-738.
85 bbl. Jan. '06, No. 106828-912.
12 bbl. Feb. '06, No. 107648-652, 107678-684.
33 bbl. Apr. '06, No. 109930-962.
33 bbl. May '06, No. 110472-504.
2 bbl. May '06, No. 111240-241.
25 bbl. May and June '06, No. 111252-276.
2 bbl. June '06, No. 111303-304.
10 bbl. June '06, No. 111927-936.
12 bbl. June '06, No. 112107-118.
1 bbl. June '06, No. 112170.
23 bbl. June '06, No. 112171-193.
3 bbl. June '06, No. 112196-198.
5 bbl. June '06, No. 112444-448.
28 bbl. July '06, No. 112452-479.
60 bbl. July '06, No. 112505-564.
50 bbl. Dec. '06, No. 113065-114.
5 bbl. Jan. '07, No. 113930-934.
5 bbl. Jan. '07, No. 114465-469.
21 bbl. Feb. '07, No. 114736-756.
582 bbl. June and July '07, No. 118822-119403.
283 bbl. July '07, No. 119514-796.

1553

62 Balance of 2758 bbls. We have no definite account of at this time.

Memorandum of Whiskies Claimed to Have Been Pledged.

5 bbl. June '03, No. 100142-46.
10 bbl. May '05, No. 104444-453.
10 bbl. May '05, No. 104479-488.
5 bbl. May '05, No. 104504-508.
7 bbl. June '05, No. 105702-708.
5 bbl. June '05, No. 105749-753.
4 bbl. June '05, No. 105755-758.
10 bbl. June '05, No. 105764-773.
5 bbl. June '05, No. 106064-068.
2 bbl. June '05, No. 106072-073.
5 bbl. July '05, No. 106314-318.
5 bbl. July '05, No. 106324-328.
8 bbl. July '05, No. 106331-338.
5 bbl. July '05, No. 106354-358.
5 bbl. July '05, No. 106515-519.
15 bbl. July '05, No. 106550-564.
40 bbl. Feb. '06, No. 108349-388.
5 bbl. April '06, No. 109734-738.
3 bbl. April '06, No. 109841-843.
35 bbl. April '06, No. 109849-883.
25 bbl. May '06, No. 110565-589.
175 bbl. May, '06, No. 110875-111049.
2 bbl. June '06, No. 111413-414.
2 bbl. June '06, No. 112105-106.
490 bbl. Dec. '06, and Jan. '07, No. 113315-804.
129 bbl. Jan. '07, No. 113960-114088.
261 bbl. Jan. '07, No. 114094-354.
10 bbl. Feb. '07, No. 115377-386.
190 bbl. Mch. '07, No. 115812-116001.
10 bbl. Apr. '07, No. 116777-786.
330 bbl. Apr. '07, No. 117137-466.
95 bbl. May '07, No. 117837-951.
100 bbl. May '07, No. 117957-118056.
450 bbl. May and June '07, No. 118107-556.
190 bbl. June '07, No. 118632-821.
110 bbl. July '07, No. 119404-513.

2758 bbl. Total.

63 *Answer and Intervening Petition of E. M. Pattison. Filed January 18th, 1910.*

In the District Court of the United States for the Southern District of Ohio, Western Division.

In the Matter of DAVID ROHRER, Bankrupt.

Answer and Intervening Petition of E. M. Pattison.

Now comes E. M. Pattison, one of the defendants mentioned in the seventh paragraph of the Application of the Trustees heretofore filed herein by Charles W. Dale, Edward Rott and Henry Ampt, Trustees of David Rohrer, and enters his appearance as a defendant to said application, and says:

First. He admits that for many years prior to the filing of the petition herein for the adjudication of the said David Rohrer as a bankrupt, the said David Rohrer had been engaged in the business of distilling Bourbon and Rye whiskies at his Distillery located near the village of Germantown, Montgomery County, Ohio, and that part of his plant and distillery consisted of four separate buildings in which the whiskies manufactured by him were placed.

He denies that said whiskies set forth in said application were or ever have been in the possession of the said David Rohrer as stated in said application, but alleges that all of said whiskies as soon as manufactured were placed in said distillery and building in the sole and exclusive possession and control of the Government of the United States of America, which has through its officers and agents so remained in possession of said whiskies from the time of the manufacture thereof up to the present time, and that it will remain in the exclusive possession and control thereof under the laws of the United States until the taxes due thereon are fully paid. That the taxes due the United States on all of the whiskies set forth in said application were unpaid at the time when said David Rohrer was adjudicated a bankrupt and are still unpaid.

Second. This defendant further says that he admits that the buildings mentioned in the Third Paragraph of the application were used exclusively for the storage of whiskies manufactured by the said David Rohrer until the tax thereon levied by the Government was paid, and he denies that the same were used for any other purpose as set forth in said application.

Third. He admits that at the time of the adjudication of the said David Rohrer as a bankrupt and the appointment and qualification of said trustees there were stored in said buildings 9,849 bar-
64 rels of Bourbon and Rye whisky, which had been made by the said David Rohrer, and had been placed therein by him, but he denies that the same was placed in said warehouses for any other purpose than that the same should be held and remain in the exclusive possession and control of the United States government until the tax thereon was paid. He denies that the title to any of the barrels of whiskey, in which this defendant is interested (and

being part of the 9,849 barrels aforesaid), hereinafter set forth, ever passed to the said Trustees upon their appointment or into their possession and he denies that said trustees ever at any time since their appointment, or now, hold possession of the same or any part thereof as set forth in the Fourth Paragraph of said application.

Fourth. This defendant has not the means of knowledge upon which he can form a judgment or belief as to the matters set forth in the Fifth and Sixth Paragraphs of said application, and he demands strict proof thereof.

Fifth. As to the matters and things set forth in the Seventh Paragraph of said application this defendant says that on or about February 23rd, 1906, he loaned said David Rohrer Five Thousand ($5,000.00) dollars for which said David Rohrer executed and delivered to him his promissory note payable in four months after date which was renewed from time to time and to secure the same assigned and transferred in writing his entire interest in 700 barrels of Bourbon and Rye Whiskey then in the possession of the United States Government and stored in Warehouses Nos. 1 and 2 of said Distillery Plant, of which 644 barrels contained Bourbon whiskey and 56 barrels contained Rye Whiskey. That 350 barrels of said whiskey was manufactured prior to February 23rd, 1906, 294 barrels thereof being stored in Warehouse No. 1 and 56 barrels thereof in Warehouse No. 2. That the serial numbers of said 350 barrels so stored in said warehouses are as follows, viz: 107853-108002 inclusive and 108003 to 108202 inclusive.

That the remaining 350 barrels of Bourbon whiskey was at the date that this defendant loaned said David Rohrer said $5,000.00 in process of manufacture and it was agreed and made part of the contract by which said money was loaned that when the manufacture thereof was completed that said David Rohrer would transfer to this defendant his interest in said 350 barrels of bourbon whiskey, and that when the process of manufacture of 200 barrels of said remaining 350 barrels was complete that the same were stored in warehouse No. 1 and placed in the possession of the United
65 States Government, and that the said David Rohrer did on the 2nd day of March, 1906, transfer and assign in writing to this defendant his entire interest in said 200 barrels of whiskey aforesaid, the serial numbers of the same being 108203 to 108402 inclusive; and when the process of manufacture of the remaining 150 barrels was complete the same were stored and placed in the possession of the United States Government in Warehouse No. 1 aforesaid and on March 9th, 1906, the said David Rohrer assigned and transferred in writing to this defendant said 150 barrels of whiskey, the serial numbers of the same being 108403-108552 inclusive.

That said note was not paid when it became due and it was agreed that the same should be renewed from time to time and the said David Rohrer did agree in consideration of the renewal thereof that his entire interest in said 700 barrels of whiskey aforesaid should continue in this defendant as security therefore. That in accordance with said agreement this defendant did renew said note at various times until September 22nd, 1909, when the said David Rohrer

executed and delivered to this defendant his promissory note of that date for said sum of $5,000, payable four months after date, and as security therefore this defendant still continues to hold said warehouse receipts above set forth. That no part of said indebtedness has been paid and that there is due to this defendant on account thereof from the said David Rohrer, said sum of $5000.00 with interest from January —, 1911.

That afterwards to-wit., on June 29th, 1905, the said David Rohrer borrowed of this defendant the further sum of $500.00, for which he executed his note payable to this defendant in four months after date, which has been renewed from time to time, and in order to secure the payment of the said note the said David Rohrer assigned and transferred in writing to this defendant 100 barrels of Bourbon whiskey then stored in Warehouse No. 1, the serial numbers of the same being 109704 to 109803 inclusive.

That said note of June 29th, 1905, was not paid when due, and it was agreed that the same should be renewed from time to time, and the said David Rohrer did agree in consideration of the renewal thereof that his entire interest in said 100 barrels of whiskey aforesaid should continue in this defendant as security for said indebtedness. That in accordance with said agreement this defendant did renew said note at various times and on September 25th, 1909, the said David Rohrer did execute and deliver to this defendant, in renewal of said note, his certain promissory note of that date
66 for the sum of $500.00, payable in four months from said date, and did then and there agree in consideration of said renewal that this defendant should continue to hold as security for said indebtedness the 100 barrels of whiskey above mentioned, bearing serial numbers 109704 to 109803 inclusive. That no part of said indebtedness has been paid and that there is due to this defendant from the said Rohrer on account thereof said sum of $500.00 with interest from the — day of January, 1910.

Sixth. That the said David Rohrer did at the time he borrowed said money from this defendant deliver to him his entire interest and right to the possession thereof, together with the right upon the payment of the Government Tax on any or all of the barrels so transferred to him, to have said whiskey delivered to him or his assigns. That in consummation of said agreement and transfer, he delivered to this defendant five written instruments copies of which are hereto attached and made part hereof marked Exhibits "A," "B," "C," "D" and "E" respectively. This defendant says that the said David Rohrer has not paid the said five thousand dollars or the said five hundred dollars so loaned him by this defendant, and that there is due to him on account thereof the sum of $5,500.00 with interest from January 22nd, 1910.

That 210 barrels of said whiskey and bearing the following serial numbers, to-wit:

108068, 108073, 108088	3	bbls.
108104, 108113	10	"
108250, 108253	4	"
108458	1	"
108528, 108532-33, 108537-52	19	"

108464-513	50 "
109704-109718	15 "
108314-108318	5 "
107900-107902	3 "
107903-907, 107909-913	10 "
109719-109723	5 "
107984-108013	30 "
108024-108033	10 "
108349-388	40 "
109734-109738	5 "
A total of	210 "

so transferred to this defendant are now in said warehouse of said Distillery Plant awaiting the payment of the Government Tax, and that this defendant is the owner thereof and has the right to the possession thereof upon such payment. That the remaining 590 barrels of whiskey so transferred to this defendant, were sold and removed from said warehouse by said David Rohrer without the knowledge or consent of this defendant.

67

This defendant denies that said whiskey or any part thereof has been in the actual and exclusive possession of and control, from and after the time of the manufacture thereof and deposit in said warehouses, in the said David Rohrer, and he alleges that he has been at all times since the transfer thereof to him as security for the payment of said loans, and is now, entitled to the possession thereof.

Seventh. He denies each and every allegation in said application not herein admitted and prays that the court may as against said trustees of the said David Rohrer, and each of the other defendants herein, adjudge and determine the title to said whiskies, in so far as the same are now situated in said warehouses, to be in this defendant, and that he may have such other and further relief as he may be legally and equitably entitled to.

HEALY, FERRIS AND McAVOY,
Attorneys for E. M. Pattison, Defendant.

UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division:

On this 15th day of January, A. D. 1910, before me personally appeared E. M. Pattison, one of the defendants named in said application, who made oath that he read the foregoing Answer and Intervening Petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he believes it to be true.

E. M. PATTISON.

Sworn to before me and subscribed in my presence this 15th day of January, 1910.

[SEAL.]

JOHN E. MOLONEY,
Notary Public in and for Hamilton County, Ohio.

EXHIBIT "A."

No. 750.

	Stored in
56 bbls.	No. 2
94 bbls.	No. 1
150 bbls.	Warehouse

68 The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *Feb. 23rd*, 1906.

Received in my Distillery Bonded Warehouse No. — First District of Ohio, for account and subject to the order of E. M. Pattison deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

One hundred and fifty Barrels D. Rohrer Pure Bourbon Whisky, 56 Bbls. Rye; 94 150; entered into bond as follows:

Serial number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
107853					
108002	7260.49	102	7405.70	Feb. 10, 12, 13, 14 & 15/06	Y 44953
					45102

56 Rye
94 Bourbon

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment of excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

69 EXHIBIT "B."

No. 748.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *Feb.* 23*rd,* 1906.

Received in my Distillery Bonded Warehouse No. — First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and Storage at the rate of Five Cents per barrel per month from Storage free

Two Hundred Barrels D. Rohrer Pure Bourbon Whisky, entered into bond as follows:

Serial number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
108003					
108202	9810.73	101 102	9988.28	Feb. 15, 16, 17, 19, 20, 21 & 22/06	Y 45103
					302

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owners' risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

70 EXHIBIT "C."

No. 747.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *Mch. 2nd,* 1906.

Received in my Distillery Bonded Warehouse No. —, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

Two hundred barrels D. Rohrer Pure Bourbon Whiskey, entered into bond as follows:

Serial number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
108203					
108402	9786.97	101 102	9965.12	Feb. 22, 23, 24, 26, 27 & 28/06	Y 45303
					45502

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owners' risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

71 This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT "D."

No. 746.

Stored in No. 1 Warehouse.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *March 9th,* 1906.

Received in my Distillery Bonded Warehouse No. —, First District of Ohio, for account and subject to the order of E. P. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

One hundred and fifty Barrels D. Rohrer Pure Bourbon Whisky, entered into bond as follows:

Serial number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
108403					
108552	7239.66	101 102	7368.62	Feb. 28 March 1, 2, 3 & 5/56	Y 45503
					652

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owners' risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate

of tax imposed by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

72 The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

EXHIBIT "E."

No. 1492.

Stored in No. 1 Warehouse.

D. Rohrer Pure Bourbon.

The David Rohrer Distillery, Montgomery County.

Fire Copper Bourbon and Pure Rye.

Brand and Distillery Established in 1847.

GERMANTOWN, O., *June 29th*, 1906.

Received in my Distillery Bonded Warehouse No. —, First District of Ohio, for account and subject to the order of E. M. Pattison, —deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and storage at the rate of Five Cents per barrel per month from Storage free

One hundred Barrels D. Rohrer Pure Bourbon Whisky, entered into bond as follows:

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
109704		101			
109803	4822.52	102	4910.73	April 11, 12, 13, & 14/'06	Y 91204
					91303

Gauged by F. P. Thompson, U. S. Gauger.

Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owners' risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

It is expressly provided that in the payment for excess under this

guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price, therefore, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal Revenue Law upon distilled
73 spirits at the date of the withdrawal.

The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*

Demurrer of the Trustees to Answer and Intervening Petition of E. M. Pattison. Filed March 26th, 1910.

In the District Court of the United States for the Southern District of Ohio, Western Division.

In Bankruptcy. No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

Demurrer of Charles W. Dale, Edward Rott, and Henry Ampt, as Trustees in Bankruptcy of the said David Rohrer, to the Answer and Intervening Petition of E. M. Pattison. Filed to the Application of said Trustees.

Now come the said Charles W. Dale, Edward Rott and Henry Ampt, as Trustees of David Rohrer, Bankrupt, and demur to the answer and Intervening Petition of E. M. Pattison for the reason:

First. That said Answer and Intervening Petition does not state facts sufficient to constitute a cause of action.

Second. That it is apparent upon the face of said Answer and Intervening Petition that the said E. M. Pattison is not entitled in law to the whiskey therein described, nor to a lien thereon, nor to the relief therein sought.

ROWE, SHUEY, MATTHEWS & JAMES,
Attorneys for said Trustees.

Amendment to Answer and Cross-Petition of E. M. Pattison. Filed April 15th, 1910.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423.

In re DAVID ROHRER, a Bankrupt.

Amendment to Answer and Cross-Petition of E. M. Pattison.

For an amendment to his answer and cross-petition herein, the said E. M. Pattison says that for more than forty years last
74 past and ever since the enactment by the Congress of the United States of the laws relating to the storing by distillers of whiskey in distillery bonded warehouses, it has been and still continues to be the usual and customary course of doing business by distillers of whiskey to sell, pledge and transfer whiskey deposited by them in their distillery bonded warehouses by the making, issuing and delivering by them of their warehouse receipts to the vendee or pledgee of the barrels of whiskey sold or pledged, describing and identifying in said warehouse receipts the barrels of whiskey sold or pledged, by their serial numbers, the date of their manufacture, the warehouse stamps thereon and the number of the bonded warehouse in which situated and agreeing in said warehouse receipts to hold said barrels of whiskey sold or pledged for the account and subject to the order of the vendee or pledgee thereof and in and by the sale and pledge as aforesaid of barrels of whiskey in their distillery bonded warehouses to obtain money and advances of money to enable them to carry on business as distillers, and, during all of said time it has been and continues to be among distillers and bankers, brokers, dealers in whiskey and all persons having transactions with distillers and established custom and a commercial usage generally known and acted upon to regard and consider said warehouse receipts as giving constructive possession of the barrels of whiskey mentioned therein and as conveying either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferable by indorsement either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in or possession of the barrels of whiskey mentioned in said warehouse receipts according to the rights of the original parties to the transaction and as constituting the owner of the distillery bonded warehouse issuing and delivering such warehouse receipts as the bailee for the vendee or pledgee of the barrels of whiskey in said warehouse receipts mentioned; and this practice and method of doing business has obtained for more than forty years, and become an important part of the commercial system of the country, so that it is well understood and according to the usual course of business that the use and purpose of a warehouse receipt is to enable the owner

of said distillery bonded warehouse to sell, pledge and transfer the title or the possession of the barrels of whiskey in his bonded warehouse for the purpose of raising money or securing advances thereon either by sale or pledge.

75 And the said defendant asks that this amendment may be taken as a part of his original answer and cross-petition.

HEALY, FERRIS & McAVOY,
Attorneys for E. M. Pattison.

STATE OF OHIO,
County of Hamilton, ss:

John C. Healy, being first duly sworn says that he is one of the attorneys for the defendant E. M. Pattison, and that the statements contained in the foregoing amendment to his answer and cross petition are true as he verily believes.

JOHN C. HEALY.

Sworn to before me and subscribed in my presence this 14th day of April, 1910.

[SEAL.]

JOHN E. MOLONEY,
Notary Public in and for Hamilton County, Ohio.

Order of Referee. Made July 9th, 1910.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

Entry Sustaining the Demurrer to the Answer and Intervening Petition of E. M. Pattison.

This day this cause came on for hearing upon the demurrer of Charles W. Dale, Edward Rott and Henry Ampt as Trustees of David Rohrer, Bankrupt, to the Answer and Intervening Petition of E. M. Pattison as amended by the filing of an amendment thereto, it having been stipulated that this demurrer should be considered as filed to the amendment as well as to the original Answer and Intervening Petiton. Said demurrer was argued by Counsel and submitted to the Referee who, being fully advised in the premises, finds said demurrer to be well taken and therefore sustains the same. The said intervening petitioner not desiring to plead further, or to amend, it is ordered that the barrels of whiskey claimed by him as a pledge, be held in possession of said Trustees and administered free from all claims and liens of the said E. M. Pattison. To all of which the said E. M. Pattison excepts.

Said intervening petitioner, E. M. Pattison, is given leave to file his petition for review on or before July 12th, 1910.

W. S. McCONNAUGHEY,
Referee in Bankruptcy.

76 *Petition of E. M. Pattison for Review of Order of the Referee Sustaining the Demurrer of the Trustees to the Answer and Cross-petition of E. M. Pattison. Filed July 9th, 1910.*

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423.

In re DAVID ROHRER, a Bankrupt.

Petition of E. M. Pattison to Review the Order of the Referee Sustaining the Demurrer of Charles W. Dale, Edward Rott, and Henry Ampt, as Trustees of David Rohrer, a Bankrupt, to the Answer and Intervening Petition of said E. M. Pattison as Amended by the Filing of an Amendment Thereto.

The petitioner E. M. Pattison, respectfully represents that heretofore, to-wit, on the 15th day of November, 1909, David Rohrer, who had heretofore for a long period of time been engaged in the manufacture of whiskies and distilled spirits on certain premises situated in Germantown, Montgomery County, Ohio, on which his distillery and certain United States Bonded Warehouses were located was adjudged a bankrupt by order of this court, and Charles W. Dale, Edward Rott and Henry Ampt, were duly appointed by said Court Trustees of said Bankrupt and are still acting as such, and said cause was referred together with all matters connected therewith, to W. S. McConnaughey, one of the Referees in bankruptcy of said Court.

That on the 18th day of January, 1910, your petitioner by leave of court filed his certain answer and intervening petition, and afterwards on the 15th day of April, 1910, an amendment thereto, wherein he asserted title to certain packages or barrels of whiskey stored in the certain bonded warehouses situated on the premises in which said distillery was operated and in which the said David Rohrer had been engaged in the manufacture of whiskies and distilled spirits as aforesaid and claiming the right to said whiskies by way of pledge as against the said Trustees and all other persons all of which is set forth in said answer and intervening petition, to which reference is hereby made.

That on the 26th day of March, 1910, the said Trustees filed a demurrer to said answer and intervening petition which was ordered by the Referee aforesaid to stand as a demurrer to said answer and intervening petition as amended as aforesaid, and reference is hereby made to said demurrer for the grounds thereof.

77 That afterwards, to-wit; on the 15th day of April, 1910, said cause came on for hearing before said Referee upon said demurrer and was argued by counsel and submitted to the court, upon consideration whereof said Referee did on the 9th day of July, 1910, sustain said demurrer and did order and adjudge that the barrels of whiskey claimed by your petitioner as a pledge be held in the possession of the said Trustees and administered free from all

claim or lien by your petitioner and giving your petitioner leave to file a petition for review on or before July 12, 1910.

Your petitioner respectfully represents that there is manifest error to the prejudice of your petitioner in the finding and order made by the Referee sustaining the demurrer of Charles W. Dale, Edward Rott and Henry Ampt, as Trustees of David Rohrer, a bankrupt, to the said answer and intervening petition of said E. M. Pattison, as amended by the filing of the amendment thereto, and in ordering in and by its said entry that the barrels of whiskey claimed by the said E. M. Pattison as pledged *to* be held in the possession of the said Trustees and administered free and clear of all claim and lien of the said E. M. Pattison.

First. That the said Referee erred in holding, in and by its said order, that the said demurrer of the said Trustees of said bankrupt was well taken and in sustaining the same.

Second. That the said Referee erred, in the said order in ordering and directing that the barrels of whiskey claimed by said E. M. Pattison, in his said answer and intervening petition and the amendment thereto as a pledge, be held in possession of said Trustees and administered free from all claim and lien of the said E. M. Pattison.

Third. That the said Referee erred, in its said order, in holding that the said E. M. Pattison, had no lien or claim to the said barrels of whiskey mentioned and described in his said answer and intervening petition and the amendment thereto and in the warehouse receipts, copies of which are filed as exhibits to said answer and intervening petition.

Fourth. That the said Referee erred, in the said order in holding that the facts stated and the transactions set up by the said E. M. Pattison, in his said answer and intervening petition herein and in the amendment thereto, did not constitute a valid pledge to the said E. M. Pattison of the barrels of whiskey mentioned in his answer and intervening petition and the amendment thereto and in the copies of the warehouse receipts filed as exhibits to said an-
78 swer and intervening petition, and did not operate to invest the said E. M. Pattison with the possession of the said barrels of whiskey.

Fifth. That the said Referee erred, in its said order, in holding that the facts stated and the transactions set up by said E. M. Pattison, in his said answer and intervening petition and the amendment thereto did not operate to give to said E. M. Pattison a valid lien by way of pledge upon said barrels of whiskey under the law of Ohio.

Your petitioner therefore pray- that the errors complained of and the questions of law and of fact raised before said Referee on said demurrer and so as aforesaid decided by him may be certified by said Referee to the Honorable Howard C. Hollister, District Judge of the United States for the Southern District of Ohio; that he may review the order heretofore made and make an entry or order, or direct the Referee to make an entry or order setting aside the entry and order heretofore made by said Referee as hereinbefore set forth, and directing said Referee to make an entry or order overruling said demurrer; and directing said Referee to make an entry holding the lien claimed by your petitioner to be a valid and subsisting lien upon

the property set forth in his said answer and intervening petition and that he may be restored to all things lost by reason of the finding and order of the referee in said matter. And your petitioner — ever pray.

EDWIN M. PATTISON, *Petitioner.*
HEALY, FERRIS & McAVOY,
Attorneys for Petitioner.

Certificate of Referee Upon Petition of E. M. Pattison for Review of Order of the Referee Sustaining the Demurrer of the Trustees to the Answer and Cross-Petition of E. M. Pattison.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

Certificate of Referee Upon Petition for Review of the Order of the Referee Sustaining the Demurrer of the Trustees to the Answer and Cross-Petition of E. M. Pattison; Also the Demurrer of the Detrick Distilling Company to the Answer and Cross-Petition of E. M. Pattison.

I, W. S. McConnaughey, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said case before me the following questions arose pertinent to said proceedings:

79 On December 30th, 1909, the Trustees filed an application for the determination of the rights of the various claimants to the whiskey in the warehouse of the bankrupt and an order as to the disposition thereof. A copy of said application is filed herewith.

January 7th, 1910, due notice of this application was sent by mail to each of the creditors of said bankrupt and by registered mail to each of the parties named in said application as having or claiming to have any interest in or lien upon said whiskey.

On January 18th, 1910, E. M. Pattison filed an answer and cross-petition to said application admitting some of the allegations in said application and denying others, and setting up a claim to certain barrels of said whiskey as pledgee thereof to secure an indebtedness therein set forth. Said answer and cross-petition is filed herewith.

On March 26th, 1910, the Trustees in this case filed a demurrer to said answer and cross-petition. Said demurrer is filed herewith.

On April 15th, 1910, said E. M. Pattison filed an amendment to said answer and cross-petition and it was stipulated that said demurrer should be considered as filed to the amendment, as well as to the original answer and cross-petition. Said amendment is filed herewith.

On May 10th, 1910, The Detrick Distilling Company filed a demurrer to said answer and cross-petition. The interest of said

Detrick Distilling Company is shown by its answer and cross-petition filed in said case which is attached to the certificate upon the petition for review by The Pearl Street Market Bank this day certified.

On July 9th, 1910, an order was entered by the Referee sustaining said demurrer of the Trustees and ordering the Trustees to hold said whiskey and administer same free of all claims or lien of said E. M. Pattison. Said order is filed herewith.

On July 9th, 1910, said E. M. Pattison filed a petition for review of said order. Said petition is filed herewith.

On July 25th, 1910, an order was entered by the referee sustaining said demurrer of The Detrick Distilling Company.

On July 25th, 1910, said E. M. Pattison filed a petition for review of said order. Said petition is filed herewith.

The question to be determined is: What interest, if any, has E. M. Pattison under the allegations of his answer and cross-petition, the amendment thereto, and the allegations of the application of
80 the Trustees admitted by him, in the whiskey described in his answer and cross-petition.

Said question is certified to the judge for his opinion thereon.

Dated at Dayton, Ohio, this 2*th* day of August, A. D. 1910.

W. S. McCONNAUGHEY,
Referee in Bankruptcy.

Opinion of Judge Hollister Affirming the Findings of the Referee. Filed January 26th, 1911.

United States District Court, Southern District of Ohio, Western Division.

No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

David Rohrer had a distillery and distillery warehouse in connection therewith in Montgomery County, Ohio. In the warehouse were stored 9849 barrels of whiskey made in the distillery. During a number of years prior to the time he was adjudged a bankrupt he issued so-called warehouse receipts against his own whiskey in his own warehouse as security to persons who had loaned him many thousands of dollars in the aggregate. In some instances the same whiskey was described in different receipts issued to different persons. In one instance six different persons had receipts describing the same whiskey. He also sold some of the whiskey to innocent purchasers.

It is claimed by the trustees in bankruptcy and by the purchasers, that the pledges were invalid in that there was no delivery of possession actual or constructive. The sole question involved in the present submission goes to the validity of the pledges.

It will serve no useful purpose to enter into a lengthy discussion of the many decisions cited by counsel bearing upon this question,

but a brief reference to some of them and the principles underlying the case may be sufficient.

It is clear that Rohrer's possession of this whiskey was complete as against everybody except the Government of the United States, which, through its officers, acted merely as guardian or watchmen to the end that the whiskey warehoused by the distiller himself should not escape the payment of the tax on distilled spirits.

The pledgees build their case on the language of Judge Acheson, in McCullough vs. Large, 20 Fed., 309, in whose opinion Mr. Justice Bradley, sitting with him on the Circuit concurred. The question was whether a sheriff acting under process issued by a State
81 Court could seize the whiskey of a distiller in his own distillery warehouse under a writ of execution. The language is:

"The whiskey in question was virtually in the possession of the United States,—held for internal revenue tax,—and the sheriff could not rightfully disturb that possession."

This case was decided in 1884 and in it no reference was made to United States vs. 36 Barrels of High Wines, 7 Blatch, 459, decided in 1870 by the Circuit Judge of the Northern District of New York. In that case the District Judge in a proceeding for condemnation for certain barrels of High Wines and Grape Brandy which had been fraudulently removed from a distillery warehouse without the payment of the tax, charged the jury that property in such a warehouse can not be considered in the possession or custody or within the control of the distiller. To this charge the attorney for the United States excepted. The Circuit Court reversed the judgment, Judge Woodruff saying among other things:

"The warehouse, in this case, was a part of the distillery premises, in the proprietorship of the claimants, and the spirits in question were there property. The Act nowhere in terms provides that the Government inspector shall have any possession, custody, or control of the spirits but only a custody of the warehouse, jointly with the owner. This is giving to the inspector, through his participation in the custody of the warehouse, and by the discharge of his duty to keep the same locked when not personally present, a means of guarding against the illegal removal of spirits, but invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition, a custody of the spirits themselves. In point of law, the owner of the spirits, and the owner of the warehouse wherein they are stored is in possession of the spirits; and I have no hesitation in saying that he could maintain any action known to the law, adapted to redress an illegal interference with his possession."

And it is further said with much else that is pertinent:

"So, here, in my judgment, the owner of both warehouse and spirits has possession and custody and control, within the meaning of the Act in question, even though, for the purpose of guardianship over the rights and interest of the Government in the tax due

thereon, the inspector be deemed to have a joint custody with him."

82 In United States *vs.* Witten, 143 U. S. 76, the action was on a bond given by Witten as principal to the United States. The condition was that the principal should pay or cause to be paid the taxes due on certain distilled spirits in his warehouse before the spirits should be removed and within three years from the date they were entered for deposit in the distillery warehouse. It was alleged that at the date of the bond, Witten had on deposit in his distillery warehouse certain distilled spirits and had failed to pay within three years from the date of entry the taxes due. The defendants were permitted to offer evidence tending to show that the locks on the doors of the warehouse, placed there by revenue officers, were not such as required by law and were insufficient and insecure and that the warehouse was broken open and the spirits stolen. The court refused to instruct the jury that even if these facts were proved yet the Government was entitled to recovery. The Supreme Court held that these facts afforded no defense, Mr. Justice Gray saying.

"Under the requirements of the internal revenue laws, the warehouse was provided by the owner of the distillery, at his own expense and on his premises, and, although declared to be a bonded warehouse of the United States, and required to be under the direction and control of a government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. The Government assumed no responsibility to him for their safe-keeping. If he was not satisfied with the security of the warehouse, he had only to take any measure, consistent with the access and supervision of the revenue officers, to make it more secure or else to pay the tax and remove the spirits. The only duty which the revenue officers owned in regard to the security of the warehouse and the safekeeping of the spirits therein, was to the government, and not to the defendants."

In Van Schoonhoven vs. Curley, et al., 86 N. Y., 187, the Court of Appeals of New York were of opinion that under such circumstances as these the distiller was not a warehouseman in the usual sense, but, as they say, "from necessity and force of law," only. At best then, the Government and the distiller have the joint custody of the warehouse and so the statute says. Sec. 3271 Comp. Stat.

The possession of personal property presumes ownership. The ownership is general or qualified. Possession must accom-

83 pany the pledge of personal property, the pledgee having qualified ownership for the purposes of the pledge. There may be a symbolical or constructive delivery, of possession to a pledgee, but that delivery must be as effectual against the general owner as the delivery of the property it represents. The property itself passes either actually or constructively out of any dominion or control of the owner, otherwise there is no pledge. Warehouse receipts symbolically pass possession from the general to the qualified owner, the pledgee, because the possession of the actual property has so far passed out of the hands of the general owner that acts of

dominion exercised by him are no longer possible. When the pledgees took these receipts they knew that the owner could satisfy such control as the Government had jointly with him by paying the tax. They knew that such control as the Government had might be raised at any moment and that the owner would then be under no restraint whatever and could roll the barrels out of the warehouse without let or hindrance from anybody. This would not be possible when goods are in a warehouse in the ordinary sense. A warehouseman is a third person who for business and for hire keeps and stores the goods of another. Black Law Dict. He is a person who receives goods and merchandise to be stored in his warehouse for hire. Bouvier's Law Dict., and other authorities cited in Bank vs. Whitehead, 39 L. R. A. 735 (Ind.); Bucher vs. Commonwealth, 103 Pa. 528; Bank vs. Shearer, 225 Pa. 470; Conrad vs. Fisher, 37 Mo. App. 352; Union Trust Co. vs. Trumbull, 137 Ill. 146. The owner stores his goods there and parts with possession. By contract with him the warehouseman issues receipts against the goods. The warehouseman has actual possession and the owner symbolical possession. The owner passes his symbolical possession on by pledge of the receipt. This is good because the owner has nodominion over the goods themselves and the pledgee succeeds to his right to get the actual goods by presenting the receipt to the warehouseman who will not, without it, part with them. The owner after pledging the receipts cannot himself get the goods. A delivery of actual possession prevents fraud of the pledgor; the delivery of the symbol should be no less effective. If he warehouses his own goods and issues receipts against them, the door is open for the grossest frauds, this case being an example.

If whiskey is stored in a general bonded warehouse provided by Section 51 of the Act of August 27, 1894, which puts it into the joint custody of the storekeeper and third person, the proprietor of the warehouse, the owner would be out of possession and such frauds would be impossible.

84 In Casey vs. Cavaroc, 96 U. S. 467, the reason is given for the necessity of the change of possession from the owner *of* the qualified owner, the pledgee. Mr. Justice Bradley says in that case:

"The requirements of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

In Fourth St. Nat. Bank vs. Millbourne Mills Co.'s Trustee, 172 Fed., 177, the Circuit Court of Appeals for the Third Circuit after making the same quotation from Casey vs. Cavaroc, say:

"It is true that a symbolical or constructive delivery is recognized in favor of articles of great bulk or difficulty of handling; but the policy of the law is against the relaxation of the rule. Sholes vs. Asphalt Company, 183 Pa. 528, 32 Atl. 1029. And even as to these there must be a surrender of dominion and a setting apart of the property, with such distinctive marks as will serve to indicate that, while in the apparent possession of the owner, it is not in fact his. Philadelphia Warehouse Company vs. Winchester (CC) 156 Fed.

600. As is well said by Judge Bradford in that case, there must be enough to negative ostensible ownership, nothing of which is to be found here."

In Bank vs. Millbourne Mills, supra the second head note is justified by what is said in the opinion. It reads:

"A man cannot make a warehouse of himself as to his own goods, and by issuing and pledging warehouse receipts make a valid transfer as against his creditors of property which remains in his possession and under his control, without anything to distinguish it from his other property or to indicate that he is not the unqualified owner."

There is nothing about this whiskey to indicate that anybody but Rohrer had any interest in it whatever, except the Government, and that interest was solely that the tax would be surely paid before the whiskey was actually removed.

It is true each barrel of whiskey had a mark and number and that these marks and numbers were carried into the receipts, but there was no way to tell by looking at the barrels that they belonged for any purpose to anybody but the owner, a fact which clearly distinguishes the case from In Re Cincinnati Iron Store Company, 167 Fed., 486.

85 Under the laws of Ohio a pledge of chattels good as against creditors, subsequent purchasers, and mortgagees in good faith must be filed in the manner prescribed unless there is an immediate delivery followed by actual and continued possession of the things mortgaged. Sec. 4150 Rev. Stat.

In Thorne vs. First National Bank, 37 O. S. 254, the law is declared to be that:

"An instrument in the form of a warehouse receipt, executed by a debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor."

The case is directly in point and its authority is not in the least disturbed by the decision of the Supreme Court of Ohio in Hunt vs. Bode, et al., 66 O. S. 255. The pledgor there had not issued a receipt against his own goods in his own warehouse. He had no possession of the chattels except such as was evidenced by the receipt in question, the validity of which was not attacked. By delivering the receipt to the bank he symbolically delivered the possession of the property. His equity in the property as represented by the receipt was valuable. This he pledged to Dieckmann and notified the bank. After the bank's claim was satisfied nobody but Dieckmann could get the balance. The pledgor's possession was gone. The bank had it to pay itself and Dieckmann.

I have only referred to some of the most important cases among the very many cited by counsel. To my view they show conclusively that the referee reached the proper conclusion as shown by the very admirable opinion filed by him in the case. The referee declined to follow the decision of the District Court in the Eastern District of Pennsylvania, in re Miller Pure Rye Distilling Company, 176 Fed., 606, in which the exact question was decided in favor of the pledgees. Counsel for the pledgees rely upon that case as estab-

lishing every principle they contend for in this and commend to the court the reasoning of the learned Judge in his opinion in that case as coinciding with the conclusions they had reached before that case was decided. It appears that the Circuit Court of Appeals for the Third Circuit has reversed that judgment.

Mr. Thomas B. Paxton, Jr., one of the opposing counsel, has filed and submitted in this case an uncertified typewritten paper purporting to be a decision of that Court, dated November 9, 1910, the opinion being written by Archbald, District Judge.

86 It is assumed that the decision is what it purports to be, and this court being in entire agreement with it, cheerfully follows it. But whether that decision was made or not, the reasons given in what purports to be the opinion, and upon the authorities cited for the invalidity of the pledges, are it seems to me, unanswerable. Orders may be taken accordingly.

The relative rights of the trustees and purchasers; the relative rights of the pledgees and the trustees, as affected by York vs. Cassell, 201 U. S. 344, and the status of those pledgees who filed their receipts as if chattel mortgages, were not argued orally or by brief by both sides in those controversies and are, therefore, not now decided.

HOLLISTER, *Judge.*

Jan. 26th, 1911.

Kramer & Kramer, for Republican Dist. Co. and Mountain Dist. Co.

H. L. Ferneding, John Shea and D. B. Van Pelt, for Geo. H. Goodman Co.

Robertson & Buchwalter, for L. L. Sadler.

E. H. & R. A. Kerr, for Detrick Dist. Co.

W. H. Mackoy, for John White.

Walter A. Ryan, for Pearl Street Market Bank.

Young & Young and Ben L. Heidingsfield, for E. Heidingsfeld.

Jackson W. Sparrow, for Frederick Burckhardt Estate.

Ferdinand Jelke, Jr., for Charles F. Hofer.

Rowe, Shuey, Matthews and James, for Benjamin M. Stiver, et al.

Cobb, Howard and Bailey for Geo. N. Edwards.

Dale & Kusworm, for Bankrupt.

Healy, Ferris & McAvoy, for Petitioner.

James F. Robinson, for Petitioner.

Gilbert N. Bettman, for Cross-petitioner.

R. M. Ochiltree, for Merchants' National Bank.

Thomas B. Paxton, Jr., for C. Sandheger Co.

A. J. Ullman, for Beech Hill Dist. Co.

Entry Giving Possession of Whiskey to Trustees in Bankruptcy. Made April 11th, 1911.

In the District Court of the United States for the Southern District of Ohio, Western Division.

In Bankruptcy. No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

87 *Entry.*

This day this cause came on to be heard upon the petition for review of E. M. Pattison of the order of W. S. McConnaughey, as Referee in Bankruptcy, sustaining a demurrer of the Trustees in Bankruptcy of said David Rohrer to the answer and intervening petition of said E. M. Pattison, and ordering that the barrels of whiskey claimed by said E. M. Pattison as pledged be held in the possession of said Trustees and be administered by them free of all claim or lien of the said E. M. Pattison.

Said petition for review upon argument by counsel was submitted to the Court, who, being fully advised in the premises, does find that there in no error in the judgment and order of the Referee in sustaining said demurrer and making the order thereunder, and does therefore approve and confirm same.

It is therefore ordered and decreed that the whiskey claimed by said E. M. Pattison be held in the possession of the said Trustees of David Rohrer and be administered by them free of any lien or claim of E. M. Pattison in accordance with the former order of the referee. To all of which E. M. Pattison excepts.

Petition for Appeal. Filed April 11, 1911.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423.

In the Matter of DAVID ROHRER, a Bankrupt.

In Bankruptcy.

EDWARD M. PATTISON

vs.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer.

Petition on Appeal.

To the Honorable Howard C. Hollister, Judge of the District Court of the United States, Southern District of Ohio, Western Division:

Your petitioner, Edward M. Pattison, considering himself aggrieved by the decree and judgment entered against him by this

Court on the 11th day of April, 1911, in the above entitled cause, confirming the decree and judgment of the Honorable W. S. McConnaughey, Referee, heretofore appointed herein, hereby appeals from the decree and judgment first hereinbefore mentioned, to the United States Circuit Court of Appeals in and for the Sixth
88 Circuit, for the reasons specified in the assignment of errors which is filed herewith; and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

EDWARD M. PATTISON,
By HEALY, FERRIS & McAVOY,
His Attorneys.

W. H. MACKOY,
ROBERTSON & BUCHWALTER,
JAMES E. ROBINSON,
WALTER A. RYAN,
H. L. GORDON,
YOUNG & YOUNG,
E. HEIDINGSFELD,
JACKSON W. SPARROW,
A. J. FREIBERG,
Of Counsel.

Assignment of Errors. Filed April 11, 1911.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, a Bankrupt.

Assignment of Errors.

And now on this 11th day of April, 1911, comes Edward M. Pattison, and says that the decree and judgment in said cause is erroneous and against the just rights of the said Edward M. Pattison, for the following reasons, to-wit:

First. Because the decree and judgment of the Court should have been rendered in favor of the said Edward M. Pattison instead of the Trustees in Bankruptcy, and the findings, judgment and decree of said Referee should have been set aside and held for naught.

Second. Because the judgment and decree rendered by the court are contrary to law.

Third. Because this court erred in confirming and approving the order of the Referee sustaining the demurrer filed by the Trustees in Bankruptcy to the answer and intervening petition, as amended, filed by the said Edward M. Pattison, when according to law said demurrer should have been overruled.

Fourth. Because upon the facts stated in the answer and inter-

vening petition, as amended, of the said Edward M. Pattison, the demurrer of the Trustees in Bankruptcy, filed thereto, should
89 according to law, have been overruled and a decree and judgment should have been rendered thereon in favor of the said Edward M. Pattison.

Fifth. Because the court erred in ordering and decreeing that upon the facts stated in the answer and intervening petition, as amended, the whiskeys claimed by the said Edward M. Pattison be held in the possession of the said Trustees of said David Rohrer and be administered by them free of any lien or claim of the said Edward M. Pattison in accordance with the order of the Referee.

Sixth. Because according to law, Charles W. Dale, Edward Rott and Henry Ampt, Trustees in Bankruptcy, were not entitled to the judgment of the court rendered in their favor against the said Edward M. Pattison, and herein complained of.

Wherefore, the said Edward M. Pattison prays that the decree and judgment herein complained of may be reversed and that said Court may be directed to enter a judgment and decree setting aside and holding for naught the judgment and decree entered by the said W. S. McConnaughey, Referee as aforesaid, and to enter a decree overruling said demurrer, and finding the title to the personal property set forth in the answer and intervening petition, as amended, of said Edward M. Pattison in the said Edward M. Pattison and granting him the right to remove the same on payment of the taxes due the government of the United States thereon.

HEALY, FERRIS & McAVOY,
Attorneys for Edward M. Pattison.

Order Allowing Appeal. Entered April 11th, 1911.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

Order Allowing Appeal.

This 11th day of April, came the said Edward M. Pattison and filed herein and presented to the court his petition, together with the assignment of errors praying for the allowing of an appeal intended to be urged by him and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Upon consideration whereof, it is ordered and decreed that
90 said appeal be and the same is hereby allowed and granted as prayed for in the petition for appeal, and that a bond be executed in the sum of $——, duly conditioned with surety, to be

approved by the court, and that upon the giving of said bond according to law, with good and sufficient surety, and upon the approval by the court, said bond shall operate as a supersedeas in favor of the said defendant, Edward M. Pattison.

Bond on Appeal. Filed April 11, 1911.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, a Bankrupt.

Bond.

Know all men by these presents,

That we, Edward M. Pattison, as principal, and The National Surety Company, as surety, are held and firmly bound unto Charles W. Dale, Edward Rott and Henry Ampt, Trustees of David Rohrer, a Bankrupt, in the just and full sum of $500.00 to be paid to the said Charles W. Dale, Edward Rott and Henry Ampt; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of April, 1911.

Whereas, lately at a session of the United States District Court, within and for the Southern District of Ohio, in a suit pending in said court, in the matter of David Rohrer, a bankrupt, wherein on the petition of Charles W. Dale, Edward Rott and Henry Ampt, Trustees in Bankruptcy of the estate of the said David Rohrer, and the Answer and Intervening Petition as amended of Edward M. Pattison, the said Edward M. Pattison having obtained an appeal from the judgment and decree rendered by the District Court of the United States for the Southern District of Ohio, and filed a copy thereof in the Clerk's Office of the United States Circuit Court of Appeals to reverse the decree in the aforesaid suit, and a citation directed to the said Trustees in Bankruptcy of the estate of said David Rohrer, the bankrupt, citing and admonishing said Trustee-to appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati in said Circuit on the 11th day of April, 1911.

Now the condition of the above obligation is such that if
91 the said Edward M. Pattison shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his appeal good, then the above obligation to be void, else to remain in full force and virtue.

E. M. PATTISON.
NATIONAL SURETY COMPANY,
By IRONI S. NASH, [SEAL.]
Attorney-in-Fact.

Signed, sealed and delivered in presence of—

——— ———.

Approved:

——— ———,
Judge U. S. District Court, S. D. O.

Præcipe for Transcript. Filed April 13, 1911.

District Court of the United States, Southern District of Ohio, Western Division.

No. 4423.

In the Matter of DAVID ROHRER, a Bankrupt.

Præcipe for Transcript.

To the Clerk:

Please prepare a transcript of the following pleadings, orders and entries in the above entitled cause:

Petition for adjudication filed November 5, 1909;

Answer of David Rohrer filed November 15, 1909;

Order of adjudication, entered November 15, 1909;

Order of Reference, issued November 15, 1909;

Order appointing Trustees;

Application of Trustees, filed December 30, 1909;

Answer and Intervening petition of E. M. Pattison, filed January 18th, 1910;

Demurrer of the Trustees to Answer and Intervening Petition of E. M. Pattison, filed March 26th, 1910;

Amendment to Answer and Intervening Petition of E. M. Pattison, filed April 15th, 1910;

Order of Referee, made July 9th, 1910;

Petition of E. M. Pattison for review of order of the Referee sustaining the demurrer of the trustees to the Answer and Cross-Petition of E. M. Pattison, filed July 9th, 1910;

Certificate of Referee upon petition of E. M. Pattison for review of Order of the Referee sustaining the demurrer of the Trustees to the Answer and Cross-petition of E. M. Pattison;

Opinion of Judge Hollister affirming the findings of the referee, filed January 26th, 1911;

Entry giving possession of whiskey to Trustees in Bankruptcy made April 11th, 1911.

92 Petition for Appeal, Assignment of Errors, Order allowing Appeal & Bond on Appeal.

HEALY, FERRIS & McAVOY,
Attorneys for E. M. Pattison.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 4423.

In the Matter of DAVID ROHRER, Bankrupt.

EDWARD M. PATTISON
vs.
CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer.

On Intervening Petition of Edward M. Pattison.

I, B. E. Dilley, Clerk of the Court aforesaid, do hereby certify that the foregoing Transcript contains a true copy of those portions of the record and proceedings of this Court requested to be copied and sent to the United States Circuit Court of Appeals for the Sixth Circuit by Messrs. Healy, Ferris & McAvoy, attorneys for E. M. Pattison, Intervening Petitioner and Appellant herein, pursuant to a Præcipe filed in this cause on the 13th day of April, A. D. 1911, a copy of which is found on page 60 hereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Cincinnati, Ohio, this 26th day of April, A. D. 1911.

Attest:

B. E. DILLEY, *Clerk*,
By HARRY F. RABE, *Deputy*.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Charles W. Dale, Edward Rott and Henry Ampt, Trustees in Bankruptcy of David Rohrer, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the* 11th day of May next, pursuant to a Petition for Appeal, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein Edward M. Pattison is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant
93 & 94 as in the said Petition for Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 11th day of April, in the year of our Lord one

thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

HOWARD C. HOLLISTER,
Judge of the District Court of the United States for the Southern District of Ohio.

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* Not exceeding 30 days from day of signing.

DAYTON, OHIO, *April 20th*, 1911.

We hereby acknowledge service of the within citation and enter the appearance of the appellees Charles W. Dale, Edward Rott and Henry Ampt, trustees in bankruptcy of David Rohrer.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Appellees.

L. W. JAMES,
Of Counsel.

No. 4423. United States District Court, Southern District of Ohio. Western Division. Edward M. Pattison, Appellant, vs. Charles W. Dale et al. Trustees of David Rohrer, Appellees. Citation on Appeal. Filed April 22, 1911. B. E. Dilley, Clerk.

95 And afterwards to wit on April 12, 1911, præcipe for appearance of counsel was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2172.

In re Petition of EDWARD M. PATTISON for Review in the Case of David Rohrer, Bankrupt.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Petitioner.

HEALY, FERRIS & McAVOY.
W. H. MACKOY.
ROBERTSON & BUCHWALTER.
JAMES E. ROBINSON.
WALTER A. RYAN.
H. L. GORDON.
YOUNG & YOUNG.
JACKSON W. SPARROW.

And afterwards to wit on February 12, 1912, an entry was made upon the Journal of said Court which is in the words and figures as follows:

96 United States Circuit Court of Appeals for the Sixth Circuit.

2172.

EDWARD M. PATTISON
vs.
CHARLES W. DALE et al., Trustees.

Before Warrington, Knappen, and Denison, C. J.J.

This cause is argued by Mr. John W. Healy, Mr. W. H. Mackoy and Mr. M. L. Buchwalter for the Petitioner and Appellant, and by Mr. W. L. James and Mr. Thomas B. Paxton, Jr., for the Respondents and Appellees and is submitted to the Court.

And afterwards towit on April 11, 1912, a decree was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2172.

EDWARD M. PATTISON, Petitioner and Appellant,
vs.
CHARLES W. DALE et al., Trustees in Bankruptcy of David Rohrer, Respondents and Appellees.

This cause came on to be heard on a petition to revise and an appeal from an order made the 11th day of April, A. D.
97 1911, in the matter of David Rohrer, Bankrupt, by the District Court of the United States for the Southern District of Ohio sitting as a court of Bankruptcy, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the said order of the said District Court be and the same is hereby reversed with costs and the cause is remanded to said District Court with instructions to overrule the demurrer and for further proceedings not inconsistent with the opinion of this Court.

And on the same day, to wit, April 11, 1911, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

98 United States Circuit Court of Appeals, Sixth Circuit.

No. 2172.

EDWARD M. PATTISON, Petitioner and Appellant,
vs.
CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Respondents and Appellees.

Submitted February 12, 1912; Decided April 11, 1912.

Petition to Review, and Appeal from, an Order of the District Court of the United States for the Southern District of Ohio.

Before Warrington, Knappen, and Denison, Circuit Judges.

This proceeding is to review an order made by the referee and affirmed by the District Court, sitting in bankruptcy, holding that certificates called warehouse receipts describing certain barrels of whiskey and given to secure present loans, were invalid, and that the whiskey be held by the trustees and administered free of any lien or claim of the holder of the certificates. David Rohrer was adjudged a bankrupt November 15, 1909, and trustees were appointed, who in December following filed an application in the court below stating that Rohrer had been engaged in distilling whiskies at his distillery in Germantown, Ohio; that as part of his distillery plant he maintained four buildings and used them only for storing his whiskey and improving it by age and until the government tax was paid; that at the time of the adjudication there were stored in three of these buildings 9,849 barrels of whiskey, which (with thirty-two barrels since sold under order of court) are claimed to have passed into possession of the trustees; that certain persons
99 named claim interests in the whiskey, some claiming to have bought, others to have bought from such vendees parts of their holdings, others to have loaned money to Rohrer upon pledge; that the "entire number of barrels of whiskey were all the time in the actual and exclusive possession and control, from and after its manufacture and deposit in said store houses," of Rohrer; that the whiskey was never delivered to such vendees and pledgees or into their possession and control. The prayer is that such claimants be required to file answers and cross-petitions setting up the nature of their several claims, and that on final hearing the rights and interests of the parties may be ascertained and determined, and also for an order to sell the whiskey.

Pattison appeared by answer and intervening petition and admitted the manufacture and storage of the whiskies, but denied the alleged possession of Rohrer or that of the trustees, and alleged that the whiskies were and are "in the sole and exclusive possession and

control of the government of the United States;" that the taxes due the United States on the whiskies at the time of the adjudication are unpaid; that on February 23, 1906, he loaned Rohrer $5,000 upon his note for that sum payable in four months, which was renewed from time to time, and to secure same Rohrer assigned and transferred in writing his entire interest in seven hundred barrels of the whiskey, which were stored in warehouses Nos. 1 and 2 before mentioned and described by serial numbers placed on the barrels. June 29, 1905, Pattison loaned a further sum of $500 to Rohrer, who gave his four months' note, and it in like manner has been renewed from time to time, and to secure the original note and renewals Rohrer assigned and transferred to Pattison in writing one hundred barrels of whiskey then stored in warehouse No. 1, describing the barrels by serial numbers; that there is due $5,500 with interest from January, 1910; that at the times the money was loaned, Rohrer delivered to Pattison five written instruments, copies of which are attached to the pleading and each of which, except descriptions and dates, is as follows:

GERMANTOWN, O., *Feb. 23rd*, 1906.

"Received in my Distillery Bonded Warehouse No. 1, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this Warehouse Receipt and the written order of the holder thereof, and on payment of the United States Government Tax and all other Taxes and Storage at the rate of Five Cents per barrel per month from Storage free.

"Two Hundred Barrels D. Rohrer Pure Bourbon Whiskey, entered into bond as follows:

100 "Serial Number-, 108003, 108202; Net Wine Gallons, 9810.73; Proof, 101, 102; Proof Gallons, 9988.28; When Made, Feb. 15, 16, 17, 19, 20, 21 and 22, 1906; Warehouse Stamp, Y 45103, 302.

"Gauged by F. P. Thompson U. S. Gauger.

"Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

"It is expressly provided that in the payment for excess under this guarantee, the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefor, and the carrying charges thereon added thereto, together with the Internal Revenue Tax thereon at the rate of tax imposed by the Internal Revenue Law upon distilled spirits at the date of the withdrawal.

"The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same becomes due.

"This warehouse receipt is given in conformity with the Warehouse laws of the State of Ohio and the laws of the United States in force at this date.

DAVID ROHRER, *Proprietor.*"

It is alleged that 590 barrels of this whiskey were sold and removed from the warehouse by Rohrer without the knowledge or consent of Pattison, but that 210 barrels remain. The prayer is that as against the trustees or any other defendants the court adjudge title to the whiskey in the 210 barrels to be in Pattison. Later, an amendment was made alleging in substance that for more than forty years and ever since the enactment of the revenue laws relating to the storing of whiskey in distillery warehouses, it has been the usual and customary course of business of distillers to sell, pledge and transfer whiskey deposited by them in such warehouses by the issuance and delivery of warehouse receipts, and describing and identifying the whiskey sold or pledged by the serial numbers of the barrels, dates of manufacture, warehouse stamps thereon, number of warehouse, and agreeing in the receipts to hold the whiskey for account and subject to the order of the vendees and pledgees, and so to obtain money and advances of money to enable them to carry on business as distillers; that during all this time distillers, bankers, brokers, dealers in whiskey, etc., have under such custom and usage regarded and considered the warehouse receipts
101 as giving constructive possession of the barrels of whiskey, and as conveying either an absolute title or special interest according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferable by endorsement either absolutely or as collateral security, and as investing the holder of the receipts with title, property in or possession of the barrels of whiskey mentioned in the receipts, and as constituting the owner of the warehouse issuing and delivering the receipts as bailee for the vendee or pledgee; that this practice has become an important part of the commercial system of the country, and is well known and understood.

The trustees filed a general demurrer, which was sustained by the referee and his action was affirmed. The order is that the whiskey be held by the trustees and administered free of all claim and lien of Pattison; and the case was brought here both on appeal and petition to revise in matter of law. No question is made touching remedy.

WARRINGTON, *Circuit Judge*, after stating the facts as above:

The legal effect of the warehouse documents[1] must be tested by the Government's custody and control of the warehouses and whiskey, and the necessity of the situation so created.

As to the warehouses: The distiller is bound to provide a warehouse on his distillery premises for the storage of distilled spirits of his own manufacture until the tax is paid. When approved and reported on by prescribed federal officers, it becomes a "bonded warehouse of the United States, to be known as a distillery warehouse" and is placed "under the direction and control of the collector of the district, and in charge of an internal-revenue storekeeper * * *" (U. S. Comp. Stat. 1901, Sec. 3271), and "in the joint custody of the storekeeper and the proprietor thereof," but

[1] Specimen copy appears in statement.

must be kept securely locked and not opened except "in the presence of such storekeeper;" and no articles shall be received in or removed from such warehouse "except on an order or permit addressed to the storekeeper and signed by the collector" (Sec. 3274). As the spirits are received in the warehouse, the gauger or storekeeper must place upon the head of each barrel an engraved stamp signed by the collector, or storekeeper, and gauger, showing number of
102 proof gallons, name of distiller, date of receipt in warehouse, and serial numbers of barrels in progressive order, and "no two or more casks or packages warehoused at the same distillery shall be marked with the same number" (id. 3287); the distiller is required within five days after the first of each month to enter the spirits for deposit, and give bond for payment of the tax before removal (id. Sec. 3293); the tax must be paid by the distiller "within eight years from the date of the original entry for deposit" (id. p. 2110). Spirits may on payment of the tax be withdrawn from the warehouse on application to the collector (id. Sec. 3294); the gauger must on receiving the collector's order gauge the spirits in the presence of the storekeeper before removal (id. Secs. 3294-3295); removal of spirits on which the tax has not been paid is forbidden under severe penalties of fine and imprisonment (id. Sec. 3296).

According to the dates of the warehouse documents, the whiskey in question was made in February, March and April, 1903, and presumably was stored in those months; it might remain there until the corresponding months of 1914.

Examination of these statutory provisions will show them to be very comprehensive. The Government requires distillers to furnish distillery warehouses of the kind in question, subject to approval of the Commissioner of Internal Revenue. It has placed them under the direction and control of collectors and in immediate charge of storekeepers with the keys. It has through severe penalties guarded against removal of whiskey until the tax is paid. While these means of control and protection do not divest the distiller of title to either warehouse or whiskey, it is plain that during the time of storage he is made to surrender the dominion and control of an owner. This is none the less true because the "duty which the revenue officers owe in regard to the security of the warehouse and the safe-keeping of the spirits therein" is to the Government (United States v. Witten, 143 U. S. 76, 79). Nor is such surrender of dominion and control affected by the joint custody of the warehouse that is given to the storekeeper and proprietor. His property is so exclusively held and dominated by the Government, that not even his creditors can seize it through attachment or other process. McCullough, Jr., v. Large, 20 Fed. 309, 312; Conrad v. Pacific Ins. Co., 31 U. S. 261, 280. It is not a sufficient answer to say, as is earnestly contended by one of learned counsel, that the distiller
avails himself of his "right of ownership, possession or con-
103 trol to inspect and repair the cooperage and to regulate temperature in the warehouse," because he can not enter or do these things except in presence of the storekeeper. The distiller can not remove the spirits except on application to the collector and pay-

ment of the excise tax. And, aside from removal to other places of storage under formalities and bond (which practically preserve the Government's power and control), there is no apparent object of removal during the aging process. The manifest purpose of allowing the spirits to be stored eight years is to enable the distiller to postpone payment of the tax until the spirits ripen into whiskey and so become fit for market. The cost of producing whiskey obviously requires either the possession of capital, or the means of obtaining it, during this waiting period. Just how much time is so required does not appear, but it is common knowledge that several years must elapse before the spirits can be marketed to the best advantage of the distiller.

As to pledge: We thus reach the controlling question, whether this inevitable situation so far removes the product from the control of the distiller as to enable him to pledge or otherwise charge his interest in it. To state the question more specifically: Can it be rightly predicated of this situation that the change of physical possession and control which takes place between the distiller and the Government furnishes a basis for the distiller, through constructive delivery made in virtue of the title remaining in him, either to effect the change of possession requisite to a pledge or to create its substantial equivalent by equitable lien? It is a familiar doctrine that possession is of the essence of a pledge, but that such possession may be constructive instead of actual. Any consideration of the subject must take into account the nature of the thing designed to be pledged. If it be capable of manual delivery, the means of effecting a change of possession are simple; if not, resort is had to constructive delivery. Constructive delivery is controlled by the necessity of the case. The object is to put the pledge under the power and control of the pledgee. Are the custody and control of the Government an adequate substitute?

In Casey v. Cavaroc, 96 U. S. 467, it was held that placing with its president bills and notes belonging to a bank for deposit with a firm (of which the president was a member) in pledge to secure a loan made to the bank (and the president turned the securities over to an employé of the bank and they were in fact used by the bank), was not such a change of possession as was necessary
104 to create a privilege by the law of Louisiana; Justice Bradley saying (477):

"The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge. * * * The possession need not be actual: it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery can not be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a

pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security,—that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession."

The cases of Union Trust Co. v. Wilson, 198 U. S. 530, and Security Warehousing Co. v. Hand, 206 U. S. 415, furnish illustrations of what conditions will, and what will not, be regarded as sufficient to exclude the owner from control of goods capable of delivery, which he owns and desires to pledge. In both cases, the place of storage was part of the structure of the pledgor. In the first case, the facts justified the conclusion that a change of possession was wrought; but the facts of the second case induced the court to characterize the scheme as a "mere pretence, a sham." This court in Re Cincinnati Iron Store Co. 167 Fed. 486, 492, held that the fact that pledged iron was stored with distinct marks to identify it on the premises of the pledgor, and placed in the custody of one of its employés did not invalidate the pledge "provided the possession was actually changed from the pledgor to the pledgee, and the pledgor's dominion over the property otherwise removed." Again, in Hurley v. Atchison, Topeka & Santa Fe Ry., 213 U. S. 126, where a mining company had contracted to mine and deliver coal sufficient to meet the current needs of the railroad company but through financial embarrassment was unable to do so, and in order to enable the mining company to keep its agreement the railroad company furnished the mining company with money in advance of the agreed times of payment, it was held that this implied (134) "a purpose that the coal as mined should be delivered, and is from an
105 equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement."

The decisions mentioned are amply illustrative of the general law respecting the necessity of change of possession to sustain a pledge, where the pledgor's custody and control admit of such change. It is manifest, however, that there are marked differences between the facts of those cases, also of their class, and the facts of the instant case. True, the Government is not a bailee of the whiskey, in the sense that it has issued or would issue warehouse receipts to the distiller. Nor is it responsible to the distiller's pledgees as agent or otherwise. But there is a union of interests in the Government and the distiller that is important. The distiller as stated requires time both to age his whiskey and pay the excise tax. The Government exacts custody and control of the spirits as a condition of granting the time. The duration of these conditions—this isolation and environment—extends into years. It results that the whiskey-product becomes an object of recognized value. Is there no lawful way to utilize this value as security?

The present warehouse documents were executed and issued by the distiller. They each apparently bear the signature of a United States gauger, indicating that he gauged the whiskey described in the receipts; but there is nothing in the record to show that the original receipts in fact bear his signature. If the gauger did sign them such act could only amount to an individual statement of the presence of the whiskey; it would not bind the Government. But

it is admitted that Rohrer manufactured the whiskey and stored it in the warehouse, and we need not consider that feature of the case. There is much controversy, however, touching possession of the whiskey, Pattison claiming that it is in the Government, and the trustees that it was in the distiller and is now in them. This results in contention on the part of the trustees that the distiller was nothing more than his own warehouseman respecting his own warehouse receipts. The argument assumes the question. It treats Rohrer's relations to the warehouse and whiskey precisely as if his custody and control were absolute and exclusive. It will not do to say either that he was in actual possession, or that he could (without paying the tax and losing the opportunity given to age the spirits) effect a physical change of possession. Union Trust Co. v. Wilson, supra, (198 U. S. at 537). The most that he could do was, in virtue
106 of his title, to give constructive possession through symbolic delivery; and then only subject to the rights of the Government. And this seems to be just what he attempted to do; for the receipts were given in "conformity" with the laws of the United States, and each contains an agreement that the pledgee shall supply the money to pay the excise tax.

It is urged that the distiller's power through payment of the tax to defeat the attempted pledge reduces the transaction to one of personal obligation alone of the distiller, and in effect destroys the security altogether. Illustration of this is said to be furnished by the fact admitted in this case, that 590 barrels of the 800 attempted to be pledged were sold and removed from the warehouse by Rohrer without the knowledge of Pattison. Serious as this is, it does not seem to be decisive. It must be conceded that it tends to limit the desirability and value of the whiskey as security. But this does not prove that there was no pledgeable interest in the whiskey. One test of this may be seen in the apparent right of the pledgee, through seasonable and proper judicial proceedings, to prevent the distiller from exercising his right of withdrawal upon showing his purpose to convert the pledge. It would hardly be claimed that because an agent acting as custodian of a pledge, or because a regular warehouseman, had wrongfully surrendered or otherwise disposed of the pledge to the damage of the pledgee, his fraud would operate to overthrow the settled law sanctioning pledges so made. Nor is the claim tenable that the whiskey gave credit to the distiller and the pledge operated to defraud his general creditors. The whiskey was not visible. The public had no access to the warehouses. Taney v. Penn Nat. Bank, 187 Fed. at 703, (C. C. A. 3d Cir.); Union Trust Co. v. Wilson, supra, p. 538. It is said all trouble could have been avoided by storing in general bonded warehouses. This may be assumed; but it would apply to all distillers, and yet it is not shown that such warehouses are at all adequate. Their selection is within the discretion of the Commissioner of Internal Revenue, and but few of such warehouses seem to have been provided. The possibility, however, of obtaining greater safety and better security does not answer the question whether whiskey in distillery warehouses is susceptible of valid pledge.

The present transactions took place in Ohio. There is no statute

of the state that appears to affect the present question. In Thorne v. Bank, 37 Ohio St. 254, it was held in respect of hams in the exclusive custody and control of the owners, which apparently could have been changed to the creditor, that (syllabus):

107 "An instrument in the form of a warehouse receipt, executed by a debtor to his creditor, on property owned by the debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor."

The case of Hunt v. Bode, Assignee, 66 Ohio St. 255, presents facts different from those in Thorne v. Bank and recognizes the principle that the delivery must be such as the nature of the case admits. The owner of warehouse receipts representing whiskey stored with a warehouseman, delivered them in pledge to a bank, and while the bank was in possession of the receipts the owner pledged his equity in them to another, gave notice of his action to the bank, and it accepted. In the first paragraph of the syllabus it is stated:

"A written pledge or transfer of an interest in warehouse receipts, or choses in action to secure a debt, is valid, without actual or manual delivery, where such receipts or choses in action are being held by another creditor on pledge as collateral security for a loan of money made by him to the same pledgor, or transferer, the second pledge or transfer being equivalent to actual delivery of the property pledged or transferred; and a request by the pledgor or transferer to his first pledgee, that when his debt is paid he deliver the collateral to his other creditor, constitutes sufficient possession of the collateral by such other creditor."

The pledgee of the equity never had actual possession of either the warehouse receipts or the whiskey represented by them, and yet the transaction was treated as equivalent to an actual delivery of the property pledged. This result was reached, as pointed out in the opinion, through the intent of the holder of the equity to deliver possession so far as the nature of the situation would permit. Thus it was said (269):

"It is the application of the familiar rule, that the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferee as the nature of the property and its situation will permit. * * * This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law."

The principle so recognized is settled; indeed, it is the basis of symbolic delivery. We may add some illustrations to those mentioned earlier herein, ending with that found in Hurley v. Atchison, Topeka & Santa Fe Ry., supra, which related to un-

108 mined coal. See 2 Kent's Com. 13 ed. pp. 500, 501; Ex parte Fitz, 9 Fed. Cas. 185, involving locomotive engines; Macomber v. Parker, 14 Pick. 497, 505, concerned a pledge of bricks as they were made and held in a brickyard; Bank v. Harkness, 42 W. Va. 156, 167, had relation to 1,800 barrels of oil in a tank; Nevan v. Roup, 8 Ia. 207, 211, a pledge of oats contained in

rail pens on the lands on which the grain was grown and threshed; Jewett v. Warren, 12 Mass. 309, 311, a pledge of logs within a boom.

There is also to be added the weight and effect of the custom respecting the pledge of whiskey deposited in distillery warehouses. The averments in this behalf are set out in the answer and cross-petition and of course so far as well pleaded are admitted by the demurrer. They are to the effect that these transactions were had in accordance with a custom of trade of more than forty years' standing, extending throughout the country; that under the custom, distillers, bankers, brokers and dealers in whiskey have during that time treated warehouse documents like these as giving constructive possession of the barrels of whiskey and as conveying an interest in the whiskey according to the nature of the transaction; and that the receipts have been treated as transferring, through endorsement, the rights of the original holders in the whiskey described in them. We can not under the pleadings accept the suggestion that this custom rests on or is affected by a statute of the State of Kentucky. In Gibson v. Stevens, 49 U. S. 383, Chief Justice Taney, when speaking of instruments which were regarded by the court as transferring the legal title and constructive possession of certain flour and pork held in warehouses in Indiana, said of the course of trade (398):

"It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if, by any decision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it. * * *"

Furthermore, we must test the intent and effect of these warehouse documents as we should if the suit were between Rohrer and
109 Pattison. As Judge Knappen said in Re Cincinnati Iron Store Company, supra, (492): "A change of possession to the extent of furnishing notice to third persons becomes immaterial as no rights of such persons have intervened." It is to be observed, too, that in Hunt v. Bode the controversy was between the pledgee and the assignee in insolvency of the pledgor; and although a creditor of the assignor prosecuted the case to the supreme court, he failed. And in Hurley v. Atchison, Topeka & Santa Fe Ry. Co., supra, it was held (134): "The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings." See also Wilson v. Leslie, 20 Ohio, 161, 166; York Mfg. Co. v. Cassell, 201 U. S. 344, 351; Security Warehousing Co. v. Hand, supra, 424, 425; Zartman v. First National Bank, 216 U. S. 134, 138.

We are constrained to hold that as between Rohrer and Pattison, the effect of the delivery of the warehouse documents was to invest Pattison with constructive possession of the barrels of whiskey described in the receipts. The warehouse documents contain the sub-

stantial elements of well-understood warehouse receipts, and no question is made as to their form. It is clear that Rohrer intended to deliver, and Pattison understood that he was to acquire, constructive possession of the barrels of whiskey. This mutual purpose ought to be carried out if it can be. According to the present record, the transactions were entered into in good faith to secure loans of money then made. The descriptions of the warehouses by their numbers and of the barrels containing the whiskey dealt with, are specific and furnish accurate means of identification. The barrels bear serial numbers, and we have seen that the Act provides that "no two or more casks or packages warehoused at the same distillery shall be marked with the same number." We conclude on this record that the action of Rohrer was an appropriation of these barrels of whiskey to the purpose of securing Pattison and Pattison alone in respect of moneys then advanced by him. It results that if we are in error in our belief that constructive possession was given, at least an equitable lien on the whiskey was created. As the present learned Chief Justice, when speaking of certain municipal bonds, said in Walker v. Brown, 165 U. S. 654, 666:

"To dedicate property to a particular purpose, to provide that a specific creditor and that creditor alone shall be authorized
110 to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien."

See also Fourth Street Bank v. Yardley, id. 634; Gardner v. Natl. City Bank, 39 Ohio St. 600, 604; Hurley v. Atchison, Topeka & Santa Fe Ry., supra, (134); Bank v. Day, 150 Ia. 696, 699, 700.

It must be remembered that we are concerned here with only the 210 barrels of whiskey remaining in the distillery. As between Rohrer and Pattison, could Rohrer be heard to say that he did not pledge this whiskey, or at least that he did not create an equitable lien upon it? We think not. We have seen that the trustees stand no better than the bankrupt.

Further, instruments similar to those now in issue have been recently upheld in well-considered decisions. In Taney v. Penn Nat. Bank, 187 Fed., 689 (C. C. A. 3d. Cir.), Judge Gray cogently discussed the question of the sale of whiskey stored in distillery warehouses. A pledge was also involved, and both court and counsel treated the subject of sale as embracing all material questions of pledge. We have purposely refrained from discussing sales. The question does not arise; and we were told in the argument that such an issue is to be presented to the court later. In the course of his opinion Judge Gray said (702):

"The relation between the distiller and the officers of the government in custody of his whiskey, is sui generis. It is prescribed by law and is not contractual. But a situation is thereby created, as above described, which in our opinon brings both of the cases before us within what we think is the well-settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property, as against creditors, to be made in the absence of physical delivery of the property sold."

The case below is reported under the name In re Miller Pure

Rye Distilling Co., 176 Fed. 606. Judge McPherson there reached the same conclusion.

Merchants National Bank of Baltimore v. Roxbury Distilling Co. was brought in the Circuit Court of the United States for the District of Maryland, and decided by Mr. John Hinkley, Special Master. Distillery warehouse receipts given in pledge were sustained. A statute of Maryland provides that all warehouse receipts issued by a United States distillery warehouse shall be governed by and be subject to the state act as fully as are the warehouse receipts of any warehouseman. Irrespective of the statute, the Master said:

111–113 "It seems clear to me that there is adequate reason for recognizing the validity of distillery warehouse receipts which *has* been given to them by long course of dealing by the traders and the banks, and that this contention should prevail. It is a growth and development of the doctrine of constructive or symbolical delivery which I have attempted to trace in this opinion, and of the underlying principle, that the Courts will recognize as constructive delivery that form of delivery which the character and situation of the goods imperatively requires."

He reached the conclusion that the receipts "are valid not only inter partes or against solvent distillers, but absolutely as vesting title in such purchasers or liens in favor of such pledgees, against subsequent creditors." His report was on March 25, 1912, sustained by Judge Morris, who said:

"But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the Special Master in his conclusion that because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States. * * *

"It appears that this constructive delivery is commonly made use of by those dealing in whiskey, and money is loaned on pledges of the certificates by banks and others in sums of great magnitude. This is so because whiskey usually must be kept in the distillery warehouse five years to mature and in no other way could the necessary money be raised and the whiskey itself be commercially dealt with except by the use of these warehouse certificates representing the whiskey."

The order and decree below must be reversed and the case remanded with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

114 & 115 And afterwards towit on May 10th 1912, a petition for rehearing was filed in said cause which is in the words and figures as follows:

Petition for Rehearing.

116 & 117 United States Circuit Court of Appeals, Sixth Circuit.

No. 2172.

EDWARD M. PATTISON, Petitioner and Appellant,
vs.
CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Respondents and Appellees.

Petition for Rehearing.

Filed May 10, 1912. Frank O. Loveland, Clerk.

118 United States Circuit Court of Appeals, Sixth Circuit.

No. 2172.

EDWARD M. PATTISON, Petitioner and Appellant,
vs.
CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Respondents and Appellees.

Petition for Rehearing.

Now come Charles W. Dale, Edward Rott, and Henry Ampt, as Trustees in Bankruptcy of David Rohrer, defendants and appellees herein, and respectfully pray that a rehearing may be granted herein for the following reasons:

First. That the decision of this Court is contrary to law.

Second. That it is contrary to the law of the State of Ohio governing such cases.

And your petitioners will ever so pray.

CHARLES W. DALE,
EDWARD ROTT,
HENRY AMPT,
As Trustees of David Rohrer, Bankrupt, Petitioners.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Petitioners.

119 THE STATE OF OHIO.
Montgomery County, ss:

Charles W. Dale makes solemn oath and says that he is one of the above-named Trustees; that the foregoing petition for rehearing is not interposed for delay.

CHARLES W. DALE.

Sworn to before me and signed by said Charles W. Dale, in my presence, this 8th day of May, A. D. 1912.

[SEAL.] SIDNEY G. KUSWORM,
Notary Public in and for Montgomery County, Ohio.

I hereby certify that the foregoing petition for rehearing is well founded in point of law.

LEE WARREN JAMES,
Of Counsel for Petitioners.

120 And on the same day, towit May 10th 1912, a motion to modify said decree was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2172.

EDWARD M. PATTISON, Petitioner and Appellant,
vs.
CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Respondents and Appellees.

Motion.

Now comes Charles W. Dale, Edward Rott and Henry Ampt, Trustees in Bankruptcy of David Rohrer, Bankrupt, Respondents and Appellees, and respectfully represent to the Court that they have filed a petition for rehearing herein and they do further represent that in the event said petition is denied, they do not desire to file a reply or plead further in this cause, but are willing and do request that this Court so amend, modify and extend its former decree herein considering the allegations of his answer and intervening petition to be true that it may direct a specific judg-
121 ment in favor of said Edward M. Pattison and as against these petitioners as Trustees aforesaid, to the effect that the title to the whiskies and the right of possession thereof claimed by the said Edward M. Pattison as against any claim or title of these Trustees, and as set forth specifically in his answer and intervening petition, be decreed to be in the said Edward M. Pattison; these petitioners reserving exceptions only to the decision and judgment upon the merits and not to the manner of its rendition.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Respondents and Appellees.

Notice of hearing of above motion for May 14th, 1912, at 9.30 A. M., acknowledged.

MACKOY & MACKOY &
HEALY, FERRIS & McAVOY &
ROBERTSON & BUCHWALTER,
Att'ys for Pattison.

And afterwards towit on June 7th 1912, an order denying petition for rehearing and motion to modify decree was entered in said cause in the words and figures as follows:

122 United States Circuit Court of Appeals for the Sixth Circuit.

#2172.

EDWARD M. PATTISON
vs.
CHARLES W. DALE et al., Trustees in Bankruptcy of David Rohrer, Bankrupt.

The petition for rehearing and motion to modify decree filed in this cause are hereby denied.

And afterwards towit on June 7th 1912, the mandate of this Court issued and was filed in the office of the Clerk below and thereafter, to-wit, on July 15th, 1912, the following petition for revision and record on appeal was filed in this Court, towit:

123 In the United States Circuit Court of Appeals, Sixth Circuit.

No. 2340.

In the Matter of DAVID ROHRER, Bankrupt.

Petition of Charles W. Dale, Edward Rott, and Henry Ampt, as Trustees in Bankruptcy of David Rohrer, Bankrupt, for Review.

Your petitioners, Charles W. Dale, Edward Rott and Henry Ampt, as Trustees of David Rohrer, Bankrupt, respectfully show to this court that, David Rohrer has been heretofore adjudicated a bankrupt by the District Court of the United States for the Southern District of Ohio, Western Division, and that your petitioners are his duly appointed and qualified trustees;

That on the 20th day of December, 1909, your petitioners, as such trustees, filed an application with W. S. McConnaughey, Referee in Bankruptcy, for the purpose of determining the title and right of possession to certain personal property, and that Edward M. Pattison, having had notice of the filing of such application, filed his Answer and Intervening Petition therein on the 18th day of January, 1910, and on the 15th day of April, 1910, he filed an Amendment to said Answer and Intervening Petition.

Your petitioners, as such trustees filed a demurrer to the Answer and Intervening Petition of said Edward M. Pattison on
124 the 26th day of March, 1910, which, by consent of parties, was considered as filed to the answer and intervening petition as amended.

The referee rendered a judgment in favor of the trustees upon

said demurrer, and the said Edward M. Pattison filed his petition for a review of the order and judgment of the referee in the District Court, which court did, on the 11th day of April, 1911, rendered an order and judgment affirming the finding and judgment of the referee.

Thereafter the said Edward M. Pattison filed his Petition for Review and Appeal to this Court, being Cause No. 2172 on the Docket thereof, entitled "Edward M. Pattison vs. Chas. W. Dale, Edward M. Rott and Henry Ampt, Trustees in Bankruptcy of David Rohrer, Bankrupt."

This court thereupon reversed the finding and judgment of the District Court, and remanded the case to that court for further proceedings.

The District Court on the fifth day of July, 1912, rendered an order and judgment in favor of the said Edward M. Pattison, decreeing the title to the personal property claimed by him and described in his Answer and Intervening Petition, to be paramount to the title of the trustee-.

The record of the proceedings in this court in cause No. 2172, by stipulation and agreement of the parties, is to be considered a part of the record in this case, and is filed herewith as Exhibit "One."

A copy of the judgment and order of the District Court of July 5, 1912, is attached hereto, marked Exhibit "Two" and made part hereof.

Your petitioners further show that the question of law involved in the decision of the District Court was, whether under the circumstances set forth in the Answer and Intervening Petition and the Amendment thereto filed by Edward M. Pattison, and in the Application of the trustees the title and right to possession of the personal property therein described is in the trustees or in the said Edward M. Pattison; that whether, under the circumstances set forth, said Edward M. Pattison acquired any title or right of possession to the personal property claimed by him.

Your petitioners further show that they are aggrieved by the orders of said District Court, and injured thereby, and that the errors complained of consist.

First, in overruling the Demurrer of the trustees to the Answer and Intervening Petition of Edward M. Pattison;

125 Second, in adjudging and decreeing that as against the trustees the title of the said Edward M. Pattison is paramount;

Your petitioners therefore ask for an early hearing of this matter, and that same may be presented on the Petition and the Exhibits filed herewith; or, if your Honor so direct, upon the original pleadings and proceedings now on file in the office of the clerk of the United States District Court, where said proceedings were had.

Wherefore your petitioners pray that the order of the District Court may be reviewed and revised in matters of law so as to adjudge that your petitioners are entitled to the property set forth in said Answer and Intervening Petition as amended, with the

right to administer same for the general estate of said Bankrupt, and free from any lien or claim of the said Edward M. Pattison, and for all proper relief.

CHARLES W. DALE,
EDWARD ROTT,
HENRY AMPT,
Trustees in Bankruptcy for David Rohrer, Bankrupt,
By MATTHEWS, JAMES & MATTHEWS,
Their Attorneys.

L. W. JAMES,
Of Counsel.

Exhibit 1 is the printed record of the proceedings in the Circuit Court of Appeals in case No. 2172, entitled Edward M. Pattison vs. Charles W. Dale, which by stipulation of the parties is to be considered a part of this record without being reprinted.

Exhibit 2 is a copy of the judgment and order of the District Court of July 5th, 1912, hereinafter printed and a part of this record.

Mandate.

(Filed June 7, 1912.)

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of Ohio, Greeting:

126 Whereas, lately in the District Court of the United States for the Southern District of Ohio, before you or some of you, in the matter of David Rohrer, Bankrupt, an order was entered on the 11th day of April, 1911, affirming the order of the referee, sustaining the demurrer of the trustees in bankruptcy of said David Rohrer to the answer and intervening petition of E. M. Pattison, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of a petition for revision and an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eleven, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged and decreed by this court, that the said order of the said District Court be and the same is hereby reversed with costs and the cause is remanded to said District Court with instructions to overrule the de-

murrer and for further proceedings not inconsistent with the opinion of this court.

April 11th, 1912.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said petition for revision and appeal notwithstanding.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 7th day of June, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Costs of Appellant and Petitioner.

Clerk	$37.45
Printing record	93.75
Attorney	20.00
	$151.20

127 *Entry.*

(Filed July 5, 1912.)

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

This day, pursuant to the mandate of the Circuit Court of Appeals heretofore filed herein, this cause came on to be heard. On consideration whereof, the Demurrer of the trustees to the Answer and Intervening Petition of Edward M. Pattison is overruled, to which the trustees, by their counsel, except.

Thereupon counsel for the trustees stated to the court that the trustees did not desire to plead further in the cause or to amend, and it was thereupon ordered, adjudged and decreed in pursuance of said mandate that as against the trustees of the said Bankrupt the title and right of possession to, the whiskies described in the Answer and Intervening Petition of the said Edward M. Pattison is paramount, and the trustees are ordered to release all claim thereto as against the said Edward M. Pattison; to which judgment and decree the trustees, by their counsel, except.

128 *Petition for Appeal in Bankruptcy.*

(Filed July 5, 1912.)

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt,

vs.

EDWARD M. PATTISON.

To the Honorable Howard C. Hollister, Judge of the District Court of the United States for the Southern District of Ohio, Western Division:

Your petitioners, Charles W. Dale, Edward Rott and Henry Ampt, trustees in bankruptcy of David Rohrer, bankrupt, considering themselves aggrieved by the decree and judgment rendered against them by this court on the fifth day of July 1912 in the above entitled cause, hereby appeal from the decree and judgment of the District Court of the United States for the Southern District of Ohio, Western Division to the United States Circuit Court of Appeals in and for the Sixth Circuit for the reasons specified in the assignment of errors filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Sixth Circuit.

CHARLES W. DALE,
EDWARD ROTT,
HENRY AMPT,
Trustees in Bankruptcy of David Rohrer, Bankrupt,
By MATTHEWS, JAMES & MATTHEWS,
Their Attorneys.

L. W. JAMES,
Of Counsel.

129 *Assignment of Errors.*

(Filed July 5, 1912.)

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt,

vs.

EDWARD M. PATTISON.

On this fifth day of July, 1912, came Charles W. Dale, Edward Rott and Henry Ampt, trustees in bankruptcy, and say that the decree and judgment in this case is erroneous, and against the just rights of the trustees, for the following reasons, to-wit:

First. Because the decree and judgment of the court should have been rendered in favor of the Trustees in Bankruptcy instead of the said Edward M. Pattison.

Second. Because the judgment and decree rendered are contrary to law.

Third. Because the court erred in overruling the demurrer of the trustees to the Answer and Intervening Petition of the said Edward M. Pattison, and in rendering judgment holding that, as against the title of the trustees the title of the said Edward M. Pattison to the whiskey described in said Answer and Intervening Petition is paramount.

Fourth. Because the court erred in ordering the trustee to surrender all claim to the title and right of possession to said whiskies to the said Edward M. Pattison.

Wherefore the said trustees pray that the decree and judgment herein complained of may be reversed, and that the court may be directed to enter a judgment sustaining said demurrer, and finding the title to the personal property set forth in said Answer and Intervening Petition to be in the said trustees.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for Trustees.

L. W. JAMES,
Of Counsel.

130 *Entry.*

(Filed July 5, 1912.)

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Complainant,
vs.
EDWARD M. PATTISON, Defendant.

This fifth day of July, 1912, came Charles W. Dale, Edward Rott and Henry Ampt, trustees in bankruptcy of David Rohrer, bankrupt, and filed herein and presented to the court their petition, together with an assignment of errors praying for the allowance of an appeal to be urged by them and praying that a transcript of the record of proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Upon consideration whereof, it is ordered and decreed that said appeal be, and the same is, hereby allowed and granted as prayed for in the petition for appeal; that a bond be dispensed with, and that the operation of the judgment be suspended during the pendency of the appeal.

131 *Stipulation.*

(Filed July 5, 1912.)

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4423. In Bankruptcy.

In the Matter of DAVID ROHRER, Bankrupt.

It is hereby stipulated by and between the parties hereto, for the purpose of expediting further proceedings in this cause in securing a review thereof by the Supreme Court of the United States, that in the preparation of the record on petition for review and appeal to be prosecuted by the trustees in bankruptcy, the record as heretofore printed in cause No. 2172 in the United States Circuit Court of Appeals for the Sixth Circuit, being a previous review of this cause on the same issues on a petition for review and appeal prose-

cuted by Edward M. Pattison, shall stand as the record, and that only the additional papers filed in this court and in the Circuit Court of Appeals shall be printed. Such former record shall be employed and used to all intents and purposes the same as if made on the appeal and petition for review to be prosecuted by the trustees in bankruptcy.

It is further stipulated by and between the parties hereto that on the presentation of said appeal and petition for review to the Circuit Court of Appeals by the trustees in bankruptcy of David Rohrer, bankrupt herein, the said Circuit Court of Appeals pursuant to its opinion and order made upon the petition for review and appeal of Edward M. Pattison, shall enter a final order in favor of the said Edward M. Pattison without further delay; exceptions being noted thereto on behalf of the trustees.

132 Dated at Cincinnati, Ohio, this 3rd day of July, A. D. 1912.

CHARLES W. DALE,
EDWARD M. ROTT,
HENRY AMPT,
Trustees in Bankruptcy of David Rohrer, Bankrupt,
By MATTHEWS, JAMES & MATTHEWS,
Their Attorneys.

L. W. JAMES,
Of Counsel.

EDWARD M. PATTISON,
By HEALY, FERRIS & McAVOY,
MACKAY & MACKAY AND
ROBERTSON & BUCHWALTER,
His Attorneys.

133 & 134 *Citation.*

(Filed July 10, 1912.)

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

To Edward M. Pattison, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein Charles W. Dale, Edward Rott and Henry Ampt as trustees in bankruptcy of David Rohrer, bankrupt, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this fifth day of July, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty seventh.

HOWARD C. HOLLISTER,
District Judge.

Service of the within citation is hereby acknowledged this 10th day of July, 1912.

HEALY, FERRIS & McAVOY,
ROBERTSON & BUCHWALTER AND
MACKAY & MACKAY,
Solicitors for E. M. Pattison.

135 And afterwards towit on July 11th, 1912, præcipe for appearance of counsel was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2340.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, as Trustees of David Rohrer, Bankrupt, Petitioners and Appellants,
vs.
EDWARD M. PATTISON, Respondent and Appellee.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Petitioners & Appellants.

MATTHEWS, JAMES & MATTHEWS.
L. W. JAMES, *Of Counsel.*

And afterwards towit on July 16th 1912, a decree was entered in said cause which reads and is as follows:

136 United States Circuit Court of Appeals for the Sixth Circuit.

#2340.

CHARLES W. DALE et al., Petitioners & Appellants,
vs.
EDWARD M. PATTISON, Respondent & Appellee.

Before Warrington, Knappen, and Denison, C. JJ.

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause cam- on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs. No special finding of facts being requested or desired by counsel for petitioners and appellants, and the Court not conceiving the same to be neeessary under General Order in Bankruptcy XXXVI, and likewise as to any conclusion of law other than as hereinbefore stated, no such finding (with separate conclusions thereon) is made.

137 And afterwards towit on July 22nd 1912, a petition for appeal was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2340.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Appellants,
versus
EDWARD M. PATTISON, Appellee.

Petition for Appeal.

The above named appellants, Charles W. Dale, Edward Rott and Henry Ampt, as Trustees in Bankruptcy of David Rohrer, Bankrupt, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has been rendered therein on the 16th day of July, A. D. 1912, affirming a decree of the Circuit Court of the United States for the Southern District of Ohio; that the matter in controversy in said suit exceeds One Thousand Dollars besides costs; that this case is one in which the United States Circuit Court of Appeals for the Sixth Circuit has not final jurisdic-
138 tion, and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the appellants pray that an appeal be allowed in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said case, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors filed herewith by the said appellants may be reviewed, and if error is found, corrected according to the laws and customs of the United States.

CHARLES W. DALE,
EDWARD ROTT AND
HENRY AMPT,
As Trustees in Bankruptcy of David Rohrer, Bankrupt,
By MATTHEWS, JAMES & MATTHEWS,
Their Attorneys.

L. W. JAMES,
Of Counsel.

And on the same day, towit July 22nd, 1912, an order allowing said appeal was entered clothed in the words and figures as follows:

139 United States Circuit Court of Appeals for the Sixth Circuit.

#2340.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Appellants,
versus
EDWARD M. PATTISON, Appellee.

Entry.

It is hereby ordered that the appeal in the above case to the Supreme Court of the United States be and is hereby allowed as prayed; that the appellants be not required to give bond, and that the operation of the judgment of this Court be suspended during the pendency of the appeal.

J. W. WARRINGTON,
Judge of the United States Circuit Court of Appeals, Sixth Circuit.

And on the same day, towit July 22nd 1912, assignments of error were filed which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

140 #2340.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Appellants,
versus
EDWARD M. PATTISON, Appellee.

Assignment of Errors.

The appellants in the above entitled cause in connection with their petition for appeal herein present and file herewith their assignment of errors, as to which matters and things they say that the decree entered herein on the 16th day of July, 1912, is erroneous, towit:

First. That the Circuit Court of Appeals erred in affirming the judgment of the District Court in overruling the demurrer of the appellants to the answer and intervening petition of Edward M. Pattison, and in rendering judgment in his favor thereon.

Second. That the Circuit Court of Appeals erred in holding that under the facts set out in the application of the Trustees, Appellants herein, and in the answer and intervening petition herein of Edward M. Pattison, Appellee herein, the execution and de-
141 livery of the distiller's warehouse receipts by the bankrupt for the whiskey in his own warehouse as a pledge for security upon a loan made to Bankrupt by Appellee gave constructive possession of the whiskey therein described to the Appellee as against the Trustees of the Bankrupt.

Third. Because the Circuit Court of Appeals erred in holding that under the circumstances set forth in the application of the Trustees and the answer and intervening petition of said Edward M. Pattison, an equitable lien in favor of said Pattison and as against the Trustees was created by the delivery of the warehouse receipts as security.

Fourth. Because the Circuit Court of Appeals erred in affirming the judgment of the District Court ordering the Trustees to surrender all claim of title and possession of the said whiskey to the Appellee.

Wherefore, the said Trustees pray that the decree and judgment herein complained of may be reversed in all things.

MATTHEWS, JAMES & MATTHEWS,
Attorneys for the Trustees, Appellants.

L. W. JAMES,
Of Counsel.

142 And on the same day, towit, July 22nd, 1912 the affidavit of Charles W. Dale was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2340.

CHARLES W. DALE, EDWARD ROTT, and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt, Appellants,
versus
EDWARD M. PATTISON, Appellee.

Affidavit.

THE STATE OF OHIO,
Montgomery County, ss:

Charles W. Dale, being duly sworn, deposes and says that he is one of the Trustees in Bankruptcy of David Rohrer, Bankrupt, and one of the Appellants in the above entitled case; affiant further states that the value of the property in controversy in this case, the title and right of possession thereto being in question, amounts to more than One Thousand Dollars, towit, about Sixteen Thousand Dollars, and that by stipulation of the Trustees with other parties in similar position of the appellee, the title and right of possession of
143 other property of the value approximately Seventy-five thousand Dollars is in controversy, and to be determined in accordance with the judgment of this case. The amount thus in controversy exceeds One Thousand Dollars exclusive of all costs.

Further affiant saith not.

CHARLES W. DALE.

Sworn to and subscribed before me by the said Charles W. Dale this 20th day of July, A. D. 1912.

[SEAL.] JOSEPH BRADFORD COOLIDGE,
Notary Public in and for Montgomery County, Ohio.

144 UNITED STATES OF AMERICA, *ss:*

To Edward M. Pattison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein Charles W. Dale, Edward Rott, and Henry Ampt, trustees of David Rohrer, bankrupt are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Warrington, Judge of the United States Circuit Court of Appeals for the Sixth Circuit this 22d day of July, in the year of our Lord one thousand nine hundred and twelve.

J. W. WARRINGTON,
Judge of the U. S. Circuit Court of Appeals for the Sixth Circuit.

CINCINNATI, OHIO, *July 22nd,* 1912.

The undersigned acknowledges service of the within citation and enters his appearance as appellee.

EDWARD M. PATTISON,
By JOHN C. HEALY, *His Attorney.*
MACKOY & MACKOY,
ROBERTSON & BUCHWALTER,
Att'ys for Appellee.

145 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings and original citation in the cases of Edward M. Pattison v. Charles W. Dale, et al., No. 2172 and Charles W. Dale, et al. v. Edward M. Pattison, No. 2340, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this — day of ——, A. D. 190–.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 23,333. U. S. Circuit Court Appeals, 6th Circuit. Term No. 330. Charles W. Dale, Edward Rott, and Henry Ampt, trustees in bankruptcy of David Rohrer, bankrupt, appellants, vs. Edward M. Pattison. Filed August 14th, 1912. File No. 23,333.

APPELLANTS

BRIEF

2

Office Supreme Court, U. S.
FILED
MAR 18 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 330

CHARLES W. DALE, EDWARD ROTT, AND HENRY AMPT, TRUSTEES IN BANKRUPTCY OF DAVID ROHRER, BANKRUPT, APPELLANTS,

vs.

EDWARD M. PATTISON, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANTS.

LEE WARREN JAMES,
Attorney for Appellants.

(23,333)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 330.

CHARLES W. DALE, EDWARD ROTT, AND HENRY AMPT, TRUSTEES IN BANKRUPTCY OF DAVID ROHRER, BANKRUPT, APPELLANTS,

vs.

EDWARD M. PATTISON, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANTS.

Statement.

David Rohrer for many years prior to November 5, 1909, owned and operated a distillery in Montgomery County, Ohio. On that day he was adjudicated a bankrupt and the appellants were appointed his trustees. On December 30, 1909, the trustees filed an application in the bankruptcy proceedings, setting forth that in the distillery warehouses of the bankrupt there were stored nine thousand eight hundred

In

and forty-nine (9,849) barrels of Bourbon and Rye whiskies, to which there were many conflicting claimants. Paragraph seventh of the application, found on page seven of the record, sets forth the names of the particular claimants to whom it was alleged the bankrupt had pledged or hypothecated certain barrels of the whiskies. Among the parties so named was the respondent, Edward M. Pattison. The application asked that all of the claimants to the whiskies in the warehouses be notified of the proceedings, that they be made parties thereto, and be required to set up their respective claims.

To this application of the trustees Edward M. Pattison filed an answer and intervening petition (Record, page 18), and later an amendment to his answer and intervening petition (Record, page 28). Briefly stated, the answer of Pattison denied the title of the trustees to two hundred ten (210) barrels of the whisky, specifying them by numbers, claiming that they were a part of a lot of eight hundred (800) barrels pledged or hypothecated to him by the bankrupt as security for certain loans. It was alleged that the remainder of the eight hundred barrels had been sold by Rohrer without the knowledge of Pattison. The transaction, according to the answer, was evidenced by certain documents in the form of warehouse receipts. A sample is as follows:

"No. 750.

"Stored in Warehouse.
"56 bbls. in No. 2.
"94 bbls. in No. 1.

"The David Rohrer Distillery, Montgomery County.

"Fire Copper Bourbon and Pure Rye.

"Brand and Distillery Established in 1847.

"GERMANTOWN, O., *Feb.* 23, 1906.

"Received in my Distillery Bonded Warehouse No. 11, " First District of Ohio, for account and subject to the order

" of E. M. Pattison, deliverable only on the return of this " warehouse receipt and the written order of the holder " thereof, and on payment of the United States Government " tax and all other taxes and storage at the rate of five cents " per barrel per month from storage free,

"One hundred and fifty barrels D. Rohrer pure Bourbon " whiskey, entered into bond as follows: 56 bbls. Rye; 94 " bbls. Bourbon.

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
107853					
108002...	7,600.48	102	7,405.70	Feb. 10, 12, 13, 14, & 15/06.	Y 44953
					45102

"56 Rye.
"94 Bourbon.
"Gauged by F. P. Thompson, U. S. Gauger.

"Loss or damage by fire, the elements, riots, accidents, " evaporation and shrinkage at owner's risk. It is hereby " guaranteed that the loss by natural evaporation and on " account of defective cooperage on each and every barrel of " this whiskey shall not be more than one gallon in excess " of the Government allowance during the first seven years " of the bonded period.

"It is expressly provided that in the payment of excess " under this guarantee the basis of settlement shall be the " cost price of said whiskey in bond at the date of tax pay- " ment figured upon the original contract price therefore, " and the carrying charges thereon at the rate of tax imposed " by the internal law upon distilled spirits at the date of the " withdrawal.

"The owner of the whiskey under this receipt in accepting " it agreed to furnish the money to pay all taxes when the " same becomes due.

"This warehouse receipt is given in conformity with the " warehouse laws of the State of Ohio and the laws of the " United States in force at this date.

"DAVID ROHRER, *Proprietor.*"

By the amendment to his intervening petition the respondent set out that for more than forty years it had been the usual and customary course of doing business by distillers for them to sell, pledge and transfer whiskies deposited by them in their distillery warehouses by issuing and delivering their warehouse receipts to the vendees or pledgees (Record, page 28). The trustees filed a general demurrer to the answer of Pattison, and that demurrer by stipulation was treated as having been filed to the amendment also.

The Pattison case was by stipulation of parties in interest taken as a test case to determine the rights of all parties in the same or similar positions, there being some 2,758 barrels of the 9,849 which were pledged by the bankrupt to various claimants, many duplicate receipts having been issued to different persons. The referee sustained the demurrer. The District Court affirmed the referee (Record, page 82). The Circuit Court of Appeals reversed the District Court and remanded the case for further proceedings. Thereupon the District Court, pursuant to the mandate, overruled the demurrer, rendering final judgment, which judgment and decree was on the 16th day of July, 1912, affirmed by the Circuit Court of Appeals, which court, however, allowed an appeal to the Supreme Court of the United States.

The following assignment of errors was filed in the Circuit Court of Appeals:

First. That the Circuit Court of Appeals erred in affirming the judgment of the District Court in overruling the demurrer of the appellants to the answer and intervening petition of Edward M. Pattison and in rendering judgment in his favor thereon.

Second. That the Circuit Court of Appeals erred in holding that under the facts set out in the application of the trustees, appellants herein, and in the answer and intervening petition herein of Edward M. Pattison, appellee herein, the execution and delivery of the distiller's warehouse receipts by the bankrupt for the whiskey in his own warehouse as a

pledge for security upon a loan made to bankrupt by appellee gave constructive possession of the whiskey therein described to the appellee as against the trustee of the bankrupt.

Third. Because the Circuit Court of Appeals erred in holding that under the circumstances set forth in the application of the trustees and the answer and intervening petition of said Edward M. Pattison, an equitable lien in favor of said Pattison and as against the trustees was created by the delivery of the warehouse receipts as security.

Fourth. Because the Circuit Court of Appeals erred in affirming the judgment of the District Court ordering the trustees to surrender all claim of title and possession of the said whiskey to the appellee.

ARGUMENT.

This court on January 26, 1914, handed down a decision in a case involving a pledge by the issuance of debtor's warehouse receipts, sustaining their validity. We refer to the case of Taney, trustee, *vs.* Penn National Bank. That was a case arising under the laws of Pennsylvania, and although it solves some of the questions in the case at bar, it does not, as we conceive it, decide the issues involved here. We shall point out certain dissimilarities between the Taney case and this one, and certain marked differences between the laws, both in letter and in policy, of the States of Pennsylvania and Ohio.

As we read the Taney case the pledges were sustained on the theory that the requirement of delivery, so essential to the validity of a pledge, was satisfied by the issuance of the receipts as being the best sort of delivery possible under the circumstances and as being in harmony with an alleged usage of the trade; that the laws of Pennsylvania warranted such a conclusion.

The court below in the case at bar sustained the validity of the pledges, on the theory that their issuance under the circumstances and pursuant to the alleged custom either invested Pattison with the constructive possession of the whiskies, or, failing in that, created an equitable lien that was good either as against the bankrupt's debtor or his trustees.

Thus there are two propositions of law which the appellants must meet, viz: first, constructive delivery; second, equitable lien.

First.

Under the law of Ohio, can the delivery of debtor's warehouse receipts be sustained as a substitute for actual delivery under the circumstances of the case at bar?

The court's attention is first directed to a clear and controlling distinction between the facts of the two cases. The legal status of both debtors with reference to the whiskey in their warehouses was the same. The character of that status has been judicially determined by this court in the Taney case. While not easy of definition, we may say that though the debtor is not in the physical control of his property, yet his right to dispose of it, subject to the rights of the Government, is unimpaired.

Now, in the Taney case, the contract between the parties was actually based upon the gauger's certificate. In our case there was no gauger's certificate. There is a recitation in our receipt that it had been gauged by F. P. Thompson, gauger. That was simply the statement of Rohrer to that effect. Nowhere does the certificate appear to have been authenticated by the gauger. It is not referred to in the answer of Pattison as being anything upon which he relied in making the loan. In the Taney case the note recited the deposit of the two hundred barrels of whiskey "as per warehouse receipts, gauger's ctf., etc., accompanying." The

record discloses that the gauger's certificates were delivered to the bank.

The signifiance of the above distinction lies in this: that in the Taney case there was something emanating from the person who had the physical control and possession of the property. It was in legal effect the bailee's certificate. It was exactly like a warehouseman's receipt. In our case nothing went to Pattison except that which the bailor could prepare. There was nothing to prevent Rohrer's writing as many receipts as his financial needs might require, *and as a matter of fact he did issue duplicate receipts, not twice, but even six and seven times.* We submit that that difference is a controlling one.

Aside from the differences in fact, however, the law of Ohio does not recognize as a delivery for the purpose of creating a pledge or security anything short of an *actual* and continued change of possession of the chattels pledged or an *actual* and continued change of possession of the muniments of title of the chattels pledged.

The law of Pennsylvania makes no distinction between delivery in case of sale or pledge. The authorities cited in the Taney case from the courts of Pennsylvania, tracing the development of the law of Pennsylvania to its present holding, that in cases where the sufficiency of the delivery is questioned "there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of the trade or business," show an interesting legal history. In all of them, however, pledges and sales are treated indiscriminately.

These judicial decisions of Pennsylvania may reflect, or possibly are, the cause of the legislative state of their laws. At any rate, so far as we have been able to discover there has never been any statutory declaration upon the subject of delivery of possession in either sales or pledges in that State.

Even with reference to the filing of chattel mortgages its

statutes are not especially illuminating. They contain, however, the only legislative declaration as to liens upon personal property. See Purdon's Digest, 13th ed., page 1201.

> "SEC. 239. All saw-logs, sawed lumber * * * "may be mortgaged for any sum not less than five "hundred dollars, by an instrument in writing, "signed by the owner thereof, or by his agent duly "constituted, and duly acknowledged before some "person authorized by law to take acknowledgments "of deeds in the following form. (Then follows a "form of mortgage.)
>
> "But the parties may include in the mortgage any "covenants not inconsistent with the provisions of "this act."
>
> "SEC. 240. Such mortgage shall, except as between "the parties thereto, take effect and be valid only "from the time of filing and indexing the same in "the office of the recorder of deeds of the proper "county; and in case of more than one mortgage, "the one first filed and indexed shall have prefer-"ence."

As before stated, that and similar sections with reference to other articles of personal property constitute, so far as we can learn, the only statutory law of Pennsylvania on the subject of liens on personal property.

In Ohio, however, there is a settled legislative policy with reference to the change of possession necessary for the creation of liens on personal property as distinguished from the statutory policy with reference to possession as bearing upon questions of absolute ownership thereof. Let us first contrast the foregoing quotation from the statutes of Pennsylvania with

Section 8560 of the General Code of Ohio (formerly Revised Statutes, 4150).

> "SEC. 8560. A mortgage, or conveyance intended "to operate as a mortgage, of goods and chattels,

"which is not accompanied by an immediate deliv-
"ery, and followed by an actual and continued
"change of possession of the things mortgaged, shall
"be absolutely void as against the creditors of the
"mortgagor, subsequent purchasers, and mortgagees
"in good faith, unless the mortgage, or a true copy
"thereof, be forthwith deposited as directed in the
"next succeeding section."

Differences are at once apparent. Where the Pennsylvania legislature merely utters a direction as to the filing of chattel mortgages, the Ohio legislature has really covered two distinct points, namely, (*a*) provided for the filing of chattel mortgages and conveyances intended to operate as chattel mortgages; (*b*) declared a rule of law sustaining the validity of these instruments, even if not filed where accompanied by an immediate delivery and followed by *an actual and continued change of possession.*

We contend that by the words "unless accompanied by immediate delivery and followed by an actual and continued change of possession" the law-making authorities of the State of Ohio established clearly and unmistakably the doctrine that any transaction designed to give a security in personal property where not filed as a chattel mortgage must be accompanied by an *actual change of possession.* True, the language of the section is "a mortgage or conveyance intended to operate as a mortgage." The difference between a pledge and a mortgage is well settled in Ohio.

Brown *vs.* Bank, 41 O. S., 459.
Jones on Pledges, sec. 7.

It may be expressed thus: A pledge is a transfer of possession that may ripen into a title by a sale had on default of the obligation; a mortgage is a transfer of title, subject to a defeasance condition. Neither can ripen into an absolute title without a sale and purchase. Obviously the language of the above statute is broad enough to cover those forms of

giving security which require a change of possession to make them valid, and that language requires the change to be *actual and continued.*

The statutory rule of Ohio as to the presumption of ownership arising from possession of personal property is found in the General Code, 8619 (Revised Statutes, sec. 4197):

> "SEC. 8619. When goods and chattels remain for "five years in the possession of a person, or those "claiming under him, to whom a pretended loan "thereof has been made, they shall be the property "of such person, unless a reservation of a right to "them is made to the lender in writing, and the in- "strument recorded within six months after the loan "is made, in the recorder's office of the county where "one or both of the parties reside, or unless such in- "strument is filed as provided by law with respect to "chattel mortgages. But if a loan of goods and "chattels is made to an art museum association "within this State, such reservation of a right to "them may be so made and recorded at any time "within five years from the date of the loan."

Argument can neither add to nor limit the above language. Under it, it is clear that for five years at least possession begets no presumption of ownership as against the real owner, whether asserted by the one having possession of the property or his creditors. From these sections can be seen the reason for the statement heretofore made that a different rule exists in Ohio as to the delivery of possession in case of sales and in case of pledges. Therefore, in case of an out-and-out sale, a distillery warehouse receipt, or even a mere verbal acknowledgment, would be sufficient to pass the title. For a sale under this statute delivery is not necessary.

Judicial recognition of these differences has been given by the Supreme Court of Ohio in the cases of

Gibson *vs.* Chillicothe Bank, 11 O. S., 311, and
Thorne *vs.* The Bank, 37 O. S., 254.

In the latter case, the court, commenting upon the former, used this language:

> "The true ground of that decision appears in the "statement of the judge delivering the opinion, that "the papers called warehouse receipts were given, "'not to secure an indebtedness merely, but, on the "contrary, that the plaintiffs, under a previous and "subsisting contract, furnished and advanced money "*for the purchase of the property*, upon an agree- "ment on the part of B. and M. to so pass to them "the title thereto.' * * * But in this case it is "not pretended there was any agreement whereby "Elias Thorne became the owner of the property."

See further to the same effect:

Roland *vs.* Gundy, 5 Ohio, 202.
Sanders *vs.* Keber, 28 Ohio State, 630.
Hamet *vs.* Letcher, 37 Ohio St., 356.

Both the Gibson case, *supra,* and the Thorne case, *supra,* were cases of the issuance of instruments in the form of warehouse receipts. The former as an out-and-out sale which was sustained: the latter as security which was held to be invalid.

The syllabus of the Thorne case reads as follows:

> "An instrument in the form of a warehouse receipt, "executed by a debtor to his creditor, on property "owned by the debtor who is not a warehouseman, for "the sole purpose of securing such creditor, is void "as against other creditors, where the property re- "mains in the possession of such debtor."

The transaction in that case was this: The pork-packing firm of Thorne, McMillan & Co., desiring to give security for an advancement made it by Elias Thorne, delivered to him documents in the form of warehouse receipts calling for certain hams then in process of curing. It appears in the record that at the time of the execution of the receipts Thorne went to the packing house, where a member of the firm said,

"I make a delivery to you," and made the further statement that he would mark them for him. Thorne acquiesced. The hogsheads containing the hams were marked "E. Thorne." All that were called for by the warehouse receipts were kept separate and apart from the other hams and meat in the house.

The hams so pledged were later sold by the firm and the proceeds applied to the payment of their bank indebtedness. Thorne sued to recover the money from the bank. The court, on page 259, after reaching the conclusion that *"the instruments in question are not warehouse receipts,"* said:

> "The instruments not being as to third persons
> " warehouse receipts, the question arises as to the in-
> " terest Elias Thorne acquired in the property. We
> " do not doubt that as to persons other than creditors
> " of the firm, and subsequent purchasers and mort-
> " gagees in good faith, Elias Thorne acquired an in-
> " terest in the hams. But the only interest he at-
> " tempted to acquire was under those receipts, the
> " acts called a delivery of the property having refer-
> " ence solely to perfecting his title under such instru-
> " ments. The bank, however, was then a creditor of
> " the firm."

On page 260 the court, continuing, used this language:

> "Here was an attempt to create, by the instruments
> " in question, a lien on the hams, to secure the debt
> " of Elias Thorne. There was no *change of pos-*
> " *session, much less a continued change of possession.*
> " There was no execution of a chattel mortgage on
> " the property, much less a filing of such mortgage
> " with the township clerk. The attempt was, there-
> " fore, within the inhibitions, and in conflict with the
> " policy of the above section, and the lien so at-
> " tempted to be secured was, as to the bank, a creditor
> " of the firm, simply a nullity."

Rohrer was not a warehouseman. He did not accept goods of others on storage for hire. He really did not have control of any of the whiskies in the warehouses. We submit, there-

fore, in view of the decision in the Thorne case and in the light of the requirement of the statute for *an actual and continued change of possession*, these so-called warehouse receipts could not operate as a delivery.

We do not mean to say that there cannot be a symbolic delivery under the law of Ohio such as will satisfy the requirement for change of possession in a pledge. That symbolic delivery, however, must be made in such way as to be complete; it must be of the actual surrender of the muniment of title. The control of the owner must be divested. We have such a case in Ohio, that of—

Hunt *vs.* Bode, 66 Ohio State, 255.

There the debtor has deposited his whiskey in a warehouse and received a perfectly valid receipt from the warehouseman. This he pledged to the Atlas Bank, surrendering possession of the receipt. It was a legal impossibility for him to exercise any control over that whiskey, because he did not have the receipt. It was utterly impossible for him to exercise any control over the receipt that would not recognize the rights of the bank. There was an excess or margin of security over his indebtedness. He secured a loan from Dieckmann and desired to secure it with this margin. An agreement to that effect was signed *and the bank was notified* that when its claim was paid the collateral should be turned over to Dieckmann. The debtor did everything he could to surrender possession and control. The notice to the bank, the court said, placed the collateral in the possession of the second creditor. On page 270 is the following:

> "Stothfang, the owner there, did all he could do.
> " He had not manual possession of the whiskey, and
> " he transferred irrevocably the muniment of title
> " thereto."

The conclusion follows, we submit, that Ohio law does not sanction this transaction as effecting either an actual or constructive delivery of the pledged whiskey.

A custom or usage of the trade or business should not prevail against such clear and unequivocal rules of law. They are not rules emanating merely from the common law—from decisions of courts—but they are rules directly traceable to the statute itself. A custom cannot be urged in opposition to an established principle of law.

C. & H. C. & I. Co. *vs.* Tucker, 48 O. S., 41-60.
Niagara County Bank *vs.* Baker, 15 O. S., 68-89.

SECOND.

Can the transaction be sustained on the theory that it creates an equitable lien good as against the bankrupt's trustees?

The court below in the case at bar said:

> "It results that if we are in error in our belief that "constructive possession was given, at least an equit- "able lien on the whiskey was created."

A decided negative was given this proposition in the case of—

Fourth St. National Bank *vs.* Millbourne Mills Co., 172 Federal Reporter, page 177.

The fourth syllabus reads:

> "A transaction intended as a pledge of property, "but which, for want of delivery, is ineffectual as a "pledge, does not create an equitable lien as against "the trustee in bankruptcy, who represents the gen- "eral creditors of the pledgor."

An actual change of possession is necessary to the validity of a pledge, which gives merely a lien. The parties to the transaction have failed to effect this change of possession. Their intentions or their desires were to make the change. The pledge was invalid, but now, on the doctrine of equitable

liens, since the parties intended to create a lien but did not do it properly, shall a lien be deemed to have been created? What becomes of the rule of law that a change of possession is essential to the validity of a pledge? Why not abandon all such rules and say that mere intention is sufficient to govern?

By section 70 of the bankrupt law the trustees become vested with property which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him, and could avoid any transfer which any creditor of the bankrupt might have avoided and recover the property so transferred.

As the courts say in the Millbourne Mills case, *supra:*

> "Liens that remain undisturbed are those that were "good against both the bankrupt and his creditors "immediately preceding the adjudication. * * * "The conclusion results not merely from a consid- "eration of the trustee's succession, but as well from "the inhibition of the act. Section 67*a* vitiates as "liens all claims which for want of record or for other "reasons the bankrupt's creditors might have avoided "as liens; that is, no secret liens or equities shall pre- "vail against the trustee that were not good against "the general unsecured creditors represented by the "trustee."

On page 186:

> *"If a pledge be similarly given, recording is not "'necessary in order to impart notice,' because no "provision has been made that a record of the fact "shall be notice of the fact; but what is 'necessary "in order to impart notice' is the delivery of exclusive "and unequivocal possession.* We think that section "67*d* does not change section 67*a* in the meaning "that 'claims which for want of record or for other "reasons' are not good liens as against creditors, are "good liens as against the estate if the lender ad- "vanced his money without any actual intent to de- "fraud unsecured creditors. He is chargeable with "constructive intent which is attributed to secrecy."

Thus we see that although Rohrer received the loans of money, for which he pledged these receipts, and although he intended to pledge the whiskey, yet, inasmuch as the creditors receiving them did not make the effort to have a change of possession which would have constituted the "notice" and supplied the lacking element that would have made their pledges valid, they are still further prevented from claiming any interest in the whiskey, or the proceeds thereof, as an equitable claim based on the comfortable but unsound theory that "that which was agreed to be done should be considered done."

The above is the reason why the York case, in 201 U. S. Rep., on page 344, which held that an unrecorded conditional sale contract is good as against all creditors who have not secured fixed liens upon the property, and, therefore, against the trustee of the purchaser, does not apply to the facts in this case.

The invalidity of the present transaction arises because they were defective as pledges.

We do not claim that these pledges are invalid because they were not recorded as chattel mortgages by the pledgees, but they are invalid because there was no change of possession. Inasmuch as no record of a pledge is required, or filing as a chattel mortgage, such recording or filing, if done and where done, is of absolutely no effect. The only way a pledge can be made valid is by a change of possession, and a filing as a chattel mortgage would not change the possession. These instruments were not intended as chattel mortgages, and section 4150, Revised Statutes, requires the filing of chattel mortgages or conveyances intended to operate as chattel mortgages, and no other. Filing would be a nullity. This distinction was recognized by this court in its decision in the case of—

Security Warehousing Co. *vs.* Hand, 206 U. S., 413.

While it is not necessary to a decision of this case, which rests upon the foregoing principles alone, yet we cannot help

saying that the decision in the York case, where the court was endeavoring to follow the Ohio rule, was based upon a misconception thereof, for the report shows the leading cases were not cited.

The only Ohio decision cited by the Supreme Court was that of Wilson *vs.* Leslie, 20 Ohio, page 161, which holds that an unfiled chattel mortgage was void as to creditors who had asserted their rights against the property and fastened upon it. But the Supreme Court of Ohio did not say that it was void as to those creditors alone, which was the construction this court placed upon it.

The question has been before the Supreme Court of Ohio in Westlake *vs.* Westlake, 47 O. S., page 316.

In that case the court held an unfiled chattel mortgage void as against the assignee for the benefit of creditors. This was also the holding in Hanes *vs.* Tiffany, 25 O. S., 549, and in Blandy *vs.* Benedict, 42 O. S., 299.

None of these cases having been cited in the Supreme Court of the United States, we respectfully submit that its decision was based upon a misconception of the facts of what the law of Ohio really is.

It is true that in the Millbourne Mills case a distinction is made between the position of the assignee for the benefit of creditors under State law and that of a trustee in bankruptcy, but the difference supports our contention rather than opposes it. For instance, read:

> "An assignment is the voluntary act of a debtor, "who can confer no authority which he does not "himself have, and whose assignee is, therefore, lim-"ited to the same extent that he is; while a trustee "in bankruptcy, as we have seen, takes title by opera-"tion of law, entirely independent of the bankrupt, "and is expressly vested with the rights of creditors, "which he is authorized to enforce."

If, therefore, under the Ohio decisions cited an unfiled chattel mortgage would be void as against an assignee, it

would have still less chance of being valid as against a trustee.

As the trustees were invested with title to all property which the bankrupt "could by any means have transferred," it is a fair argument to say that in this case, where the bankrupt did make subsequent transfers in exactly the same form as the first one, to the number of five or six, the trustees would be entitled to that property. In this connection the distinction between the right to make a transfer and the power to make it should, of course, be borne in mind. The original transaction did not take it out of the power of Rohrer to either pledge or sell.

Nor can we concede that it is at all compatible with the facts as to the intentions of the parties that they should have an equitable lien. They had abundant means of protecting themselves. They could have had the property placed in a general bonded warehouse, without the necessity for paying the tax, and have taken legal receipts, which would have passed as negotiable instruments. They could have also taken chattel mortgages. Let us admit, for the purpose of the argument, that creditors did not extend credit to Rohrer on the strength of his possession of certain numbers of barrels of whiskey. If that is true, then there could have been no reason why the laws of Ohio as to executing and filing chattel mortgages should not have been complied with. Chattel mortgages are usually not given, because the filing of them is apt to impair the mortgagor's credit. Since there could have been no open knowledge as to the number of barrels of whiskey in the distillery warehouse, persons did not deal with the bankrupt on the faith of his ownership of the 210 barrels of whiskey unencumbered, and it would not, therefore, have impaired his credit. There was no sound business reason why chattel mortgages were not executed and filed. There is no circumstance beyond the control of the parties that prevented their accomplishing something which was agreed to be accomplished.

The takers of these pledges were careless, and must pay the penalty for their carelessness.

We respectfully submit that these parties in the transaction set forth violated clearly established principles of the law of Ohio. They did not take the means at hand to protect themselves. It was legally possible for them to have gotten a valid lien either by way of pledge or by way of chattel mortgage. They have not shown in the answer and intervening petition any reason why the rule requiring an actual and continued change of possession either of the chattel itself or the muniment of title thereto should be suspended in their favor. They have not shown a circumstance beyond their control that would entitle them to an equitable lien.

We respectfully submit that the judgment and decree of the Circuit Court of Appeals should be reversed.

LEE WARREN JAMES,
Attorney for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES W. DALE, EDWARD ROTT and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt,

Appellants,

vs.

EDWARD M. PATTISON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Appellee.

I.

STATEMENT OF QUESTION.

The question presented to the court for its consideration and determination upon the record in this case is, whether, as to distilled spirits marked as required by law and in the custody of the United States in a distillery bonded warehouse situated in the State of Ohio,

warehouse receipts signed, issued and delivered by the distiller and owner of the warehouse, in due course of business and much more than four months before his adjudication as a bankrupt, to a pledgee as collateral security for a loan of money, which receipts described particular barrels of spirits in said distillery bonded warehouse, by their serial numbers, number of wine and of proof gallons, date when made and number of warehouse stamps, constituted a valid pledge and equitable lien in favor of the pledgee, the validity of which neither the bankrupt, nor his trustees could be heard to question or deny.

The exact question presented by the record in this case was presented to this court and determined by it in favor of the validity of warehouse receipts issued and delivered to a pledgee under the circumstances hereinabove stated, for barrels of spirits deposited in a distillery bonded warehouse in Pennsylvania, in the case of

Taney v. *Penn. National Bank of Reading*, decided January 16, 1914, and reported in Vol. 34, Supreme Court Reporter, No. 7, p. 288.

It is only necessary, therefore, to consider in this brief, whether the rule laid down by this court with reference to warehouse receipts issued and delivered for spirits in distillery bonded warehouses in Pennsylvania, shall apply, under the same circumstances, to spirits similarly situated in Ohio.

II.

STATEMENT OF CASE.

The facts and the issues in this case are stated fully and correctly in the opinion rendered by the lower court,

the United States Circuit Court of Appeals for the Sixth Circuit, which constitutes a part of the bound record in this case. (Rec., pp. 90-100.)

They are also stated correctly, although, probably, not so fully in the brief filed in this case on behalf of Appellants. It is not necessary, therefore, to restate them here.

The answer and intervening petition of the appellee denies the title of the Trustees to the two hundred and ten (210) barrels of whiskey claimed by them in their application, stating their serial numbers, and claims that they were a part of a lot of eight hundred (800) barrels of whiskey pledged to the appellee by delivery of warehouse receipts therefor as security for certain loans.

The warehouse receipts mentioned in the answer and intervening petition are attached to it as exhibits. They are five in number and were issued and delivered to the appellee on and between February 23, 1906, and June 29, 1906, as shown by their dates. (For answer and intervening petition and exhibits thereto, see Rec., pp. 18-27.)

The amendment to the answer and intervening petition sets up, that, for more than forty years, there had been and still continued to be an established custom, generally known and acted upon, to regard and consider warehouse receipts as giving constructive possession of the barrels of whiskey mentioned therein and as conveying either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferrable by indorsement either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in, or possession of the barrels of whiskey mentioned in said receipts, according to the rights of the original parties to the transaction,

and as constituting the owner of the distillery bonded warehouse issuing and delivering such receipts as the bailee for the vendee or pledgee of the barrels of whiskey in said receipts mentioned, etc. (See Rec., pp. 28, 29 for amendment to answer and intervening petition.) All the facts alleged in the answer and intervening petition and the amendment thereto are admitted by the demurrer filed thereto.

III.

ARGUMENT.

The law of Ohio recognizes the rule that, actual physical delivery of pledged goods by the pledgor to the pledgee is not essential to the validity of the pledge as against the creditors of the pledgor when goods are so situated that actual physical delivery can not be made, or where, by trade usage, actual physical delivery is excused.

The opinion of the court from which this appeal is prosecuted in regard to the law of Ohio is entitled to great weight in the determination of the question as to what the Ohio rule is upon the facts above stated.

It was rendered by Judge Warrington, a lawyer in the full practice of his profession in the state of Ohio for thirty or more years prior to his appointment to the bench of the United States Circuit Court for the Sixth Circuit, and is reported in 196 Fed., p. 5, and is also to be found in the Record in this case, pp. 90-100.

The question as to the Ohio rule was argued fully in the lower court, both orally and by brief, and the Ohio cases cited in the brief filed here on behalf of appellants, were cited and relied upon by counsel for appellants in the lower court.

Section 8560 of the Ohio General Code (Revised Statutes, Section 4150), and Sec. 8619 of the Ohio General Code (Revised Statutes, Sec. 4197), cited and quoted in the brief filed here by counsel for appellants, were also cited and quoted in the brief filed in the lower court on behalf of appellants.

As to the relevancy of those Sections of the Ohio Statutes to the question before it, the lower court said (196 Fed., 12, Record at foot of p. 96):

> "The present transaction took place in Ohio. There is no statute of the state that appears to affect the present question."

The case of *Hunt* v. *Bode, Assignee,* 66 Ohio State, 255, as the lower court states in its opinion (196 Fed., 12, Rec. p. 97):

> "presents facts different from those in *Thorne* v. *Bank* (37 Ohio State, 254), and recognizes the principle that the delivery must be such as the nature of the case admits."

Before proceeding to the consideration of the case of *Hunt* v. *Bode, Assignee,* it is proper to call the attention of the court to page 13 of brief for appellants and to the sentence immediately following the title of the last mentioned case which reads as follows, viz:

> "There the debtor has deposited his whiskey in a warehouse and received a perfectly valid receipt."

The inference that might be drawn from that sentence, if attention were not called to it, is that, somewhere in the statement of facts, or in the opinion in the case of *Hunt* v. *Bode, Assignee,* it appeared that the warehouse receipts there mentioned were altogether different from

the warehouse receipts exhibited in the record in this case, which the appellants claim to be invalid. The warehouse receipts in *Hunt* v. *Bode, Assignee,* are mentioned as "warehouse receipts for whiskey" and whether deposited in a distillery bonded or in a commercial warehouse does not appear from the case as reported.

The presumption is that they were warehouse receipts of the same kind as those issued to the appellee in this case as the removal of whiskey from a distillery bonded warehouse to another warehouse is exceptional and is attended with expense and a large loss from evaporation incident to the removal.

Independent of the character of the warehouse receipts in *Hunt* v. *Bode, Assignee,* that case is conclusive authority for the proposition, that, in Ohio, the rule is that a delivery, in the case of a pledge, is good when it is such as the nature of the case admits.

The lower court in its opinion (196 Fed., 12, 13; Record, 97), has stated the facts in *Hunt* v. *Bode, Assignee,* relating to the delivery as a pledge of the warehouse receipts and the subsequent repledging by their owner of his equity therein, and has quoted from the syllabus and the text of the opinion in that case. The case of *Hunt* v. *Bode, Assignee,* states so clearly the Ohio rule with reference to delivery when there can be no actual physical delivery of the property, that other parts of the opinion are here quoted for the convenience of the court.

At the outset of the opinion in that case, p. 267, the question presented to the court for its determination with regard to delivery, is stated thus:

> "The Atlas National Bank, having in its possession certain warehouse receipts for a stock of whiskey given it by H. F. Stothfang in pledge as collateral for a loan of money made to him by

the bank, could the pledger make another valid pledge, or a transfer to Dieckmann of an interest in the same receipts, without any change of possession, as collateral security for a debt due him from the pledgor?"

On page 268, the Court, after referring to the fact that delivery of the property pledged is generally essential to a valid pledge, says:

"But it does not follow that actual or physical delivery should always accompany the sale or transfer, and this is also true as to the pledging of choses in action or other kinds of personal property. The delivery in some cases may be symbolical, such as the handing over the writing which constitutes the title to the property, just as was done in this case, to secure the Atlas National Bank for the money it had loaned to Stothfang. He delivered to the bank, not the one hundred and sixty-five barrels of whiskey, but the warehouse receipts for the same, which were its muniment of title and control of the property they represented. And when the pledgor desired to secure the payment of the note held against him by Dieckmann, he executed and delivered to him the transfer of all interest in the receipts which would remain, after the bank's claim should be satisfied. This transfer was not strictly a pledge, but an assignment and transfer of the stated interest in the warehouse receipts; but if it is desired that we call it a pledge, as has been done by counsel, we still observe, that constructive possession in the second pledgee would be sufficient, if the intent to deliver such possession is clearly apparent. It is the application of the familiar rule, that the transfer is complete and delivery made, when the owner has done all that he can do in the

premises, and has given such possession to the pledgee or transferree as the nature of the property and its situation will permit. In this case Stothfang owned a valuable equity in the warehouse receipts held by the bank, as their sale afterwards made manifest, and it was such interest in them that could be made the subject of sale and transfer, *and even pledge,* and certainly Stothfang gave to Dieckmann possession of all interest in and title to the receipts which would remain after the debt due the bank was satisfied. This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law."

In support of its opinion the court, pp. 269-270, cites and quotes from,

Story on Bailments, Sec. 297.
Wilson v. *Little,* 2 Comstock, 143.
Tuxworth v. *Moore,* 9 Pick., 347.
Whitaker v. *Summer,* 20 Pick., 399.

The court will observe that in *Hunt* v. *Bode, Assignee,* the controversy was between the pledgee and the assignee in insolvency of the pledgor. The relation in which the parties litigant stood to each other in that case was identically the same as that which the appellants and the appellee sustain to each other in the case at bar.

The rule laid down in *Hunt* v. *Bode, Assignee,* is the same as the Pennsylvania rule.

White v. *Gunn,* 205 Pa., 229, states the Pennsylvania rule as follows:

"What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to

take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

The barrels of whiskey shown to have been pledged in this case, were identified by the warehouse receipts issued to the appellee in like manner as the warehouse receipts exhibited in *Taney, Trustee,* v. *Penn. National Bank of Reading.* (Supreme Court Reporter, Vol. 34, No. 7, p. 288, Advance Opinions, No. 7, March 1, 1914, p. 288.)

With regard to the intent and effect of the warehouse receipts in this case, counsel for appellee quotes here, as a part of this brief, that portion of the opinion of the lower court relating thereto (196 Fed., 14, 15, Record 98, 99):

"Furthermore, we must test the intent and effect of these warehouse documents as we should if the suit were between Rohrer and Pattison. As Judge Knappen said in *Re Cincinnati Iron Store Company, supra,* (167 Fed., 492; 93 C. C. A., 128):

"'A change of possession to the extent of furnishing notice to third persons becomes immaterial, as no rights of such persons have intervened.'

"It is to be observed, too, that in *Hunt* v. *Bode,* the controversy was between the pledgee and the assignee in insolvency of the pledgor;

and although a creditor of the assignor prosecuted the case to the Supreme Court, he failed. And in *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co., supra,* it was held (page 134 of 213 U. S., page 469 of 29 Sup. Ct., 53 L. Ed., 729):

" 'The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings.'

"See, also, *Wilson* v. *Leslie,* 20 Ohio, 161, 166; *York Mfg. Co.* v. *Cassell,* 201 U. S., 344, 351, 20 Sup. Ct., 481, 50 L. Ed., 782; *Security Warehousing Co.* v. *Hand, supra,* 206 U. S., 424, 425, 27 Sup Ct., 720, 51 L. Ed., 1117, 11 Ann. Cas., 789; *Zartman* v. *First National Bank,* 216 U. S., 134, 138, 30 Sup. Ct., 368, 54 L. Ed., 418.

"We are constrained to hold that, as between Rohrer and Pattison, the effect of the delivery of the warehouse documents was to invest Pattison with constructive possession of the barrels of whiskey described in the receipts. The warehouse documents contain the substantial elements of well understood warehouse receipts, and no question is made as to their form. It is clear that Rohrer intended to deliver, and Pattison understood that he was to acquire, constructive possession of the barrels of whiskey. This mutual purpose ought to be carried out if it can be. According to the present record, the transactions were entered into in good faith to secure loans of money then made. The description of the warehouses by their numbers and of the barrels containing the whiskey dealt with are specific and furnish accurate means of identification. The barrels bear serial numbers, and we have seen that the act provides that:

" 'No two or more casks or packages warehoused at the same distillery shall be marked with the same number.'

"We conclude on this record that the action of Rohrer was an appropriation of these barrels of whiskey to the purpose of securing Pattison and Pattison alone in respect of moneys then advanced by him. It results that if we are in error in our belief that constructive possession was given, at least an equitable lien on the whiskey was created. As the present learned Chief Justice, when speaking of certain municipal bonds, said in *Walker* v. *Brown*, 165 U. S., 654, 666, 17 Sup. Ct., 453, 457 (41 L. Ed., 865):

"'To dedicate property to a particular purpose, to provide that a specific creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.'

"See, also, *Fourth Street Bank* v. *Yardley*, 165 U. S., 634, 17 Sup. Ct., 439, 41 L. Ed., 855; *Gardner* v. *National City Bank*, 39 Ohio St., 600, 604; *Hurley* v. *Atchinson, Topeka & Santa Fe Ry., supra*, 213 U. S., 134, 29 Sup. Ct., 466, 53 L. Ed., 729; *Bank* v. *Day*, 150 Iowa, 696, 699, 700, 130 N. W., 800."

In addition to the cases cited by the lower court in its opinion, the attention of this court is called to what it has said with regard to the question of equitable lien in the concluding part of its opinion in

Sexton, Trustee in Bankruptcy, v. *Kessler & Co.*, 225 U. S., 90, 56 L. Ed., 995.

In the Taney case, both in this court and in the District Court and the Circuit Court of Appeals, it was contended that the Pennsylvania rule, established by a long line of authorities, that, "where there is nothing in the case but the retention of a physical possession by the

vendor, which he is capable of delivering to the vendee, such retention is fraud per se, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty."

This Court disposed of that contention, however, by calling attention to the fact that the rule had never been applied by the Courts of Pennsylvania to cases, "where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usuages of the trade or business in which the sale was made."

In Ohio, the Pennsylvania rule, that, "the retention of possession by the vendor of goods which he is capable of delivering to the vendee, is fraud per se," never obtained.

In *Hombeck* v. *Vanmetre*, 9 Ohio, 153, the court, in its opinion, after referring to the rule in Pennsylvania and certain other states, holds that, in Ohio, "where the vendor in a bill of sale or mortgage retained the possession, that circumstance is *prima facie* evidence of fraud, but is not fraud *per se*."

In *Wilson* v. *Leslie*, 20 Ohio, 161, 166, it is held that:

> "But the mere fact that the mortgagee omitted, for several days or several weeks, to deposit his mortgage deed with the clerk of the township or recorder of the county, as the case might require, would by no means render his security void. *It would not be void as against the mortgagor, if not filed in the office at all.*"

If, therefore, the Pennsylvania rule is not applied in that state to cases "where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made," there is, certainly, no reason why the Ohio rule should be applied to preclude a delivery under the same circumstances.

The case of *Bode* v. *Hunt, Assignee*, and cases cited *supra*, are authority for the proposition that a delivery in Ohio, under the circumstances stated, is a valid delivery.

It was not necessary to the validity of the pledge that notice thereof should be given to the collector of internal revenue. Possession passed to the pledgee upon the delivery of the warehouse receipt. The collector would be under no legal obligation to pay attention to it and would ignore it. The U. S. government would be charged with no duty to the holders of warehouse receipts and could be placed under no legal obligation to them.

The general rule in the United States is that attornment is not necessary to complete symbolical delivery.

David v. *Russell*, 52 Cal., 611, 615.
Durr et al v. *Harvey*, 44 Ark., 301, 306, 307.

IV.

BRIEF FOR APPELLANTS CONSIDERED.

First.

Counsel for appellants endeavor to distinguish this case from the Taney case upon the ground, that, in the

Taney case, there was a delivery of the gauger's certificates as well as of the warehouse receipts.

The gauger's certificates appear to have been introduced at the hearing before the master, to whom a reference had been made, by the District Court, probably for the purpose of showing that the whiskey was in the warehouse and the number of gallons. The delivery of the gauger's certificates to the pledgee could not operate as a constructive delivery nor create an equitable lien as they were in no sense muniments of title. Neither the United States or its official, the gauger, occupied a contractual relation to the distiller or owed any official duty to him. It was the delivery to the pledgee of the warehouse receipts by the distiller which operated to place the pledgee in the constructive possession of the barrels of whiskey described therein. A delivery of the gauger's certificates merely would have meant nothing and would have conveyed nothing. The fact, therefore, that they accompanied the receipts does not add anything to the effect of the receipts, nor would the fact that they did not accompany the receipts have impaired the validity of the pledge.

The provisions of the U. S. Statutes with reference to the deposit of distilled spirits in distillery warehouses, their gauging and marking immediately upon their deposit therein, their subsequent regauging before withdrawal, or at the end of the seven years, to determine the allowance to be made for loss by evaporation are solely for the protection of the government in the collections of its taxes and to prevent frauds.

The government, as to its custody of distilled spirits in distillery bonded warehouses, owes no duties to third persons and will not undertake to perform any.

In *Taney* v. *Penn. Nat. Bank*, 187 Fed., 689, the Court, at p. 702, says:

> "The relation between the distiller and the officers of the government in custody of his whiskey is *sui generis*. It is prescribed by law and is not contractual."

Counsel for appellants contended in the lower court, as he does here, that, "in the Taney case the contract between the parties was actually based upon the gauger's certificates."

In answer to the claim so made, the lower court held (196 Fed., 11; Record, 95):

> "The present warehouse documents were executed and issued by the distiller. They each apparently bear the signature of a United States gauger, indicating that he gauged the whiskey described in the receipts, but there is nothing in the record to show that the original receipts in fact bear his signature. If the gauger did sign, such act could only amount to an individual statement of the presence of the whiskey; it would not bind the government. But it is admitted that Rohrer manufactured the whiskey and stored it in the warehouse and we need not consider that feature of the case."

Second.

Neither Section 8560, Ohio General Code (Revised Statutes, Section 4150), with regard to chattel mortgages, nor Section 8619, Ohio General Code (Revised Statutes, Section 4197), with regard to the loan of chattel property, relate or have any application to pledges or the mode by which a pledge of personal property may be effected.

In his brief filed in the lower court on behalf of appellants, counsel for appellants, in regard to those sections.

made the same claim that he does here, but the lower court disposed of his contention with the statement that,

> "There is no statute of the state that appears to affect the present question."

A chattel mortgage is another and different thing from a pledge. The mortgaged chattels remain in the possession of the mortgagor and unless the instrument creating a lien thereon should be recorded or filed as required by law, the mortgagor would be able to obtain a fictitious credit.

Section 8519 relates to a loan of chattel property and may be regarded in two aspects, either as a statute of repose or limitation as to parol loans of chattels, or as intended to prevent the lender of chattels from aiding the person to whom the loan is made to acquire a fictitious credit. In either view of the case, Section 8619 can not be construed to apply to pledges.

Chattel mortgages and instruments to secure the return of goods loaned, belong to a class of securities altogether different from pledges.

The true rule is that the class can not be enlarged by judicial construction so as to include other instruments not described, which have been held to be valid by the common law and entitled to enforcement in accordance with their terms.

In *Parshall et al* v. *Eggert, Sheriff*, 54 N. Y., 18, the facts were that a debtor issued to his creditor an instrument in the form of a warehouse receipt upon certain specified property in his own store. The debtor having absconded, the creditor exhibited the instrument to the debtor's clerk, who thereupon surrendered the keys of the store, containing the goods mentioned in the receipt, to the creditor who locked the store and took the

keys away with him. Later in the same day, the sheriff caused the door of the store to be unlocked by a smith and levied a writ of attachment on the goods. It was contended in the lower court by the sheriff, and the contention was sustained by the court, that the instrument in question was a security in the nature of a chattel mortgage and therefore absolutely void under the law of New York because not filed. The judgment was reversed by the Court of Appeals.

At page 23 of the opinion in the case, the court says:

> "A chattel mortgage is a present transfer of the title to the property mortgaged, subject to be defeated on payment of the sum or instrument it is given to secure. In default of performance by the mortgagor of the condition, the title of the mortgagee becomes absolute. (*Brownell* v. *Hawkins*, 4 Barb., 491; *Langdon* v. *Buel*, 9 Wend., 80; *Wilson* v. *Little*, 2 Coms., 443.) The instrument now in controversy, executed by Roche, declares the property mentioned in it to be held by him in his store for account of the plaintiffs, subject to their order, as security for his note, given that day for $1,450. In the absence of fraud, every instrument is to be construed so that it may have effect according to the intention of the parties, if that can be consistently with the rules of law. Had the property in question been delivered by Roche to the plaintiffs on the terms expressed in this paper, it would have created a valid pledge and not a mortgage. (*Story on Bailments*, Sec. 286; *4 Kent. Com.*, 138; *2 Kent Com.*, 581, 582). It may be considered as showing conclusively against Roche that the property was delivered by him to the plaintiffs, and redelivered by them to him to be held for them, according to the terms of the receipt. If there be any difficulty in

maintaining this view, it may be supported on another ground.

"I know of no authority denying the right of a party who has a contract for a pledge, ineffectual for want of delivery, to obtain a delivery at a subsequent time, and thus to validate the pledge. Upon general principles, the only obstacle which can prevent such a transaction from being effectual, must be the intervention of fraud. Certainly there is no rule of law which requires a pledge in writing to be filed as a chattel mortgage; nor is it consonant with any rules for the construction of statutes to borrow such a requirement as to pledges from the positive provisions which, when enacted, were introductive of a new rule, and which declared unfiled chattel mortgages absolutely void as against creditors; nor is there any warrant for saying that because a chattel mortgage unfiled could not be afterward filed with the effect to cut off the right of an intermediate creditor to avoid it as under the statute conclusively fraudulent, therefore, a pledge of undelivered goods can not be made effectual against an intermediate creditor by delivery, in the absence of fraud."

In *Thorne* v. *National Bank*, 37 O. S., 254, cited in brief for appellants, a debtor firm which was not a warehouseman, issued an instrument in the form of a warehouse receipt for goods in its own store to secure its creditor, Thorne. The debtor, thereafter, sold the goods and applied the money received from the sale to pay a debt due from it to the First National Bank, whereupon Thorne sued the Bank to recover the money so paid to it. Thorne was defeated in the action, the Court holding, (p. 260), that there was no change of possession and

therefore no pledge, and no chattel mortgage, much less a filing of such mortgage with the township clerk.

The facts in the Thorne case have been stated so that this court can see that it has no application whatever to the case at bar.

In the case now before the court, as in the Taney case, there could be no actual physical delivery of the barrels of whiskey mentioned in the warehouse receipts and identified by their serial numbers for the reason that, as stated by this court in the Taney case, they were, "in the complete control of the government," and, "effectually taken out of the distiller's power so that he was absolutely unable to make a physical delivery of them until the tax was paid."

The distiller can obtain no fictitious credit upon the faith that he has goods stored in a distillery bonded warehouse for two seasons, first, because the public has no access to such warehouse and can not know that he has distilled spirits stored therein; and, second, because the established usage of the trade is notice to all persons dealing with a distiller, that the distilled spirits, if any, stored in a distillery bonded warehouse may have been sold or pledged by means of warehouse receipts issued by the distiller.

The custom and trade usage set up in the amendment to the answer and intervening petition filed by the appellee (Rec., p. 28), does not conflict with any rule of law in the state of Ohio, statutory or otherwise, but is in strict conformity with the rule of law in Ohio as settled in the case of *Bode* v. *Hunt, Assignee,* and other cases cited *supra.*

The Ohio cases relating to chattel mortgages cited in the brief filed on behalf of appellants, all relate to instru-

ments of a class other and different from pledges, and, therefore counsel for appellee do not think it necessary to consider them. To do so would simply consume time without purpose.

The fact that the distiller, as the person whom the law now requires to pay the tax on distilled spirits before they can be removed from a distillery bonded warehouse (28 Stat. L. 563, Sec. 48), may, fraudulently or by mistake, sell the spirits to a third person, does not affect the question under consideration. A commercial warehouseman may do the same thing or a person having goods on deposit in a commercial warehouse, may by connivance with, or through the ignorance, oversight or carelessness of the warehouseman, procure the same thing to be done. An instance of this kind is afforded in *Second National Bank* v. *Walbridge*, 19 Ohio State, 419.

At the time of the transactions in this case, the receipts of commercial warehousemen were not negotiable instruments. They were not made so until May 9, 1908. (99 Ohio Laws, 400-412.)

The fact that the appellee might have pursued another mode of obtaining security does not affect the mode pursued here if otherwise valid, although counsel for appellants so contends.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

W. H. Mackoy,
Of Counsel for Appellee.

Healy, Ferris & McAvoy,
Mackoy & Mackoy,
M. L. Buchwalter,
Attorneys for Appellee.

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No. 330.

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES W. DALE, EDWARD ROTT and HENRY AMPT, Trustees in Bankruptcy of David Rohrer,

Appellants,

versus

EDWARD M. PATTISON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Additional Brief for Appellee.

HEALY, FERRIS & McAVOY,
MACKOY & MACKOY and
M. L. BUCHWALTER,
Attorneys for Appellee.

Court Index Press, 646-650 Main Street, Cincinnati, Ohio, April, 1914.

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES W. DALE, EDWARD ROTT and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt,

Appellants,

No. 330. *vs.*

EDWARD M. PATTISON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Additional Brief for Appellee.

In Ohio the Rights of the Assignee in the Property Assigned are no Greater than those of the Debtor Prior to the Assignment.

On page 17 of the brief filed in this case on behalf of the appellants, counsel for appellants has cited the three following Ohio cases, viz.:

Hanes v. *Tiffany*, 25 O. S., 549,
Blandy v. *Benedict*, 42 O. S., 229, and
Westlake v. *Westlake*, 47 O. S., page 316,

and claims that they conflict with the rule laid down in *Wilson* v. *Leslie*, 20 Ohio, 161.

The rule in *Wilson* v. *Leslie* is stated upon page 12 of the brief filed herein by the counsel for appellee. At the time counsel for appellee wrote the brief filed by them herein, it did not seem to them to be necessary to refer to the cases cited by counsel for appellant on page 17 of his brief as they relate solely to chattel mortgages and have no bearing upon the question before the court in this case.

It has occurred to counsel for appellee, since the filing of the brief on behalf of the appellee, that it may be proper to call the attention of this court to the fact that the cases, *supra*, of *Hanes* v. *Tiffany*, *Blandy* v. *Benedict* and *Westlake* v. *Westlake*, in no way modify, conflict with or affect the ruling of the court in *Wilson* v. *Leslie*, 20 Ohio, 161.

In the case of *Hanes* v. *Tiffany*, 25 O. S., 549, the chattel mortgage there was held void and invalid because it did not comply with 66 Ohio Laws, p. 345, Sec. 2, with reference to mortgages given to indemnify the mortgagee against a liability as surety for the mortgagor. In such cases the section of the Ohio Law referred to required that there should be entered upon the mortgage by the mortgagee "*a true statement of such liability, and that the instrument was taken in good faith to indemnify against any loss that may result therefrom.*" This statement was required to be verified on oath. It was for the reason that the chattel mortgage there, did not have entered thereon the sworn statement required by the act referred to that it was held void as against the creditors of the mortgagor and, therefore, void as against the assignee for the benefit of creditors.

In *Blandy* v. *Benedict,* 42 O. S., 295, there was the same failure as in *Hanes* v. *Tiffany,* to enter upon the chattel mortgage the sworn statement required to be made upon a chattel mortgage executed to indemnify a surety.

The chattel mortgage was, therefore, held void both against creditors and the assignee for the benefit of creditors.

In *Westlake* v. *Westlake,* 47 O. S., 316, a chattel mortgage was executed jointly by two persons as mortgagors who resided in different townships. It was filed in the proper office in the township in which one of the two mortgagors resided, but it was not filed in the township in which the other mortgagor resided.

Section 4151, Ohio Revised Statutes, then in force, required that the mortgage should be deposited *"with the township clerk of the township where the mortgagor resides at the time of the execution thereof, if a resident of the state."*

The court held at page 317 of its opinion, that the word "mortgagor" in Section 4151, must be held to include the plural as well as the singular and that:

> "When a chattel mortgage is executed by several resident mortgagors, the statute requires that the mortgage, or a true copy, be filed in the township where the mortgagors at the time respectively reside, as essential to the validity of the mortgage as against creditors."

For the reason stated in the opinion of the court, the mortgage was held void as against the creditors of the mortgagors and the assignee for the benefit of creditors.

In *Wilson* v. *Leslie,* 20 Ohio, at page 166, the court says as to an unfiled chattel mortgage:

> "It would not be void as against the mortgagor, if not filed in the office at all. It would not be void as against that class of creditors who are equally remiss with the mortgagee and took no steps to fasten upon the property for the payment of their debts. Until placed in the proper office, the mortgage of chattels in our state would be void as against other creditors of the mortgagor and subsequent purchasers and mortgagees, whose rights then attach."

Brown & Co. v. *Webb*, 20 Ohio, 389, is to the same effect as *Wilson* v. *Leslie*. It holds that:

> "A mortgage of personal property, where the mortgagor retains possession by virtue of the mortgage, with a power of sale, is void, as against subsequent purchasers, and execution creditors, but when possession is taken by the mortgagee, the mortgage becomes valid so as to protect the mortgaged property from execution creditors not having made a levy, and against subsequent purchasers from the mortgagor."

Cass v. *Rothman*, 42 O. S., 380, cites *Wilson* v. *Leslie* with approval.

It also quotes with approval Section 237 of *Jones on Chattel Mortgages* to the effect that it is sufficient that the filing of chattel mortgages "*be done any time before possession is taken, or interest or liens are acquired by others.*"

In *Hodson* v. *Barrett*, 33 O. S., 63, it is held that:

> "In the case of an assignment of an insolvent debtor for the benefit of creditors, the rights of the assignee in the property assigned are not greater than those of the debtor prior to the assignment."

In *Morgan* v. *Kinney*, 38 O. S., 610, it is held that:

> "Under a deed of general assignment for the benefit of creditors, the assignee takes the real estate subject to all valid liens existing thereon against the assignor."

Counsel for appellee fail to see the pertinency here of the cases relating to chattel mortgages which have been cited in the brief upon behalf of appellants.

In the present case the delivery of the warehouse receipts for property so circumstanced that it could not otherwise be delivered, was long prior to the adjudication of Rohrer as a bankrupt.

The delivery made accorded with established trade usage and is recognized as valid under the Ohio rule stated in *Hunt* v. *Bode, Assignee*, cited in former brief of counsel for appellee.

It is respectfully submitted, therefore, that the judgment of the lower court should be affirmed.

W. H. Mackoy,
Of Counsel for Appellee.

Healy, Ferris & McAvoy,
Mackoy & Mackoy,
M. L. Buchwalter,
Attorneys for Appellee.

DALE v. PATTISON.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 330. Argued April 23, 1914.—Decided June 8, 1914.

The legal effect of a transaction involving pledge or hypothecation depends upon the local law; and if the state law permits the pledged property to remain under certain conditions in the possession of the pledgor and those conditions exist, the trustee in bankruptcy of the pledgor takes subject to the rights of the pledgee. *Taney* v. *Penn Bank*, 232 U. S. 174.

There is a well-recognized distinction between a chattel mortgage and a pledge; and a state statute requiring the delivery of the chattel or recording of the instrument does not necessarily apply to a pledge of personal property so situated that it is not within the power of the owner to deliver it to the pledgee.

Where property is from its character or situation not capable of actual delivery, the delivery of a warehouse receipt or other evidence of title is sufficient to transfer the property and right of possession. *Gibson* v. *Stevens*, 8 How. 384.

Notwithstanding §§ 8560 and 8619, General Code of Ohio, the law of that State recognizes the force of long continued commercial usage and the effectiveness of a symbolical delivery of personal property by the transfer of warehouse receipts representing the same.

Where neither statutes nor decisions of the courts are directly to the contrary, the courts may refer to established trade customs as evidence of what has been long understood to be the law. *Gibson* v. *Stevens*, 8 How. 384.

The law of Ohio not being dissimilar from that of Pennsylvania in recognizing the validity of transfers by delivering warehouse receipts representing property under conditions similar to those involved herein, this case is controlled by *Taney* v. *Penn Bank*, 232 U. S. 174.

196 Fed. Rep. 5, affirmed.

DAVID ROHRER, for many years prior to November 5, 1909, owned and operated a distillery in Montgomery County, Ohio. On that day he was adjudicated a bank-

rupt, and the appellants were appointed his trustees. In the following month they filed an application in the bankruptcy proceedings setting forth that in the distillery warehouses of the bankrupt there were stored about 9,800 barrels of Bourbon and rye whiskies, to which there were many conflicting claims; among the claimants being certain named persons to whom it was alleged the bankrupt had pledged or hypothecated certain barrels of the whiskies. One of the parties so named was the respondent, Edward M. Pattison. The application prayed that all of the claimants be notified of the proceedings, be made parties thereto, and be required to set up their respective claims. Pattison filed an answer and intervening petition, claiming that 210 barrels of whiskey (specifying them by numbers), were a part of a lot of 800 barrels that had been pledged or hypothecated to him by Rohrer as security for certain loans; the remainder of the 800 barrels having been sold by Rohrer without the knowledge of Pattison. It was denied that the whiskies were or ever had been in Rohrer's possession, it being alleged that all of them, as soon as manufactured, were placed in the storage warehouse in the possession and control of the Government of the United States, and that certain moneys were loaned by Pattison to Rohrer, to secure payment of which the latter assigned and transferred in writing to the former his entire interest in certain designated barrels of whiskey then on storage in said warehouse, the agreement and transfer being evidenced by documents in the form of warehouse receipts, of which the following is a sample:

"No. 750.

"Stored in Warehouse.

"56 bbls. in No. 2.

"94 bbls. in No. 1.

"The David Rohrer Distillery, Montgomery County.

"Fire Copper Bourbon and Pure Rye.

"Brand and Distillery Established in 1847.

"GERMANTOWN, O., *Feb.* 23, 1906.

"Received in my Distillery Bonded Warehouse No. 11, First District of Ohio, for account and subject to the order of E. M. Pattison, deliverable only on the return of this warehouse receipt and the written order of the holder thereof, and on payment of the United States Government tax and all other taxes and storage at the rate of five cents per barrel per month from storage free,

"One hundred and fifty barrels D. Rohrer pure Bourbon whiskey, entered into bond as follows: 56 bbls. Rye; 94 bbls. Bourbon.

Special number.	Net wine gallons.	Proof.	Proof gallons.	When made.	Warehouse stamp.
107853					
108002	7,600.49	102	7,405.70	Feb. 10, 12, 13. 14, & 15/06	Y 44953
					45102

"56 Rye.

"94 Bourbon.

"Gauged by F. P. Thompson, U. S. Gauger.

"Loss or damage by fire, the elements, riots, accidents, evaporation and shrinkage at owner's risk. It is hereby guaranteed that the loss by natural evaporation and on account of defective cooperage on each and every barrel of this whiskey shall not be more than one gallon in excess of the Government allowance during the first seven years of the bonded period.

"It is expressly provided that in the payment of excess under this guarantee the basis of settlement shall be the cost price of said whiskey in bond at the date of tax payment figured upon the original contract price therefor, and the carrying charges thereon added thereto, together with the Internal Revenue tax thereon at the rate of tax imposed by the Internal Revenue law upon distilled spirits at the date of the withdrawal.

"The owner of the whiskey under this receipt in accepting it agrees to furnish the money to pay all taxes when the same become due.

"This warehouse receipt is given in conformity with the warehouse laws of the State of Ohio and the laws of the United States in force at this date.

"DAVID ROHRER, *Proprietor.*"

By an amendment to his intervening petition, Pattison set forth:

"That for more than forty years last past and ever since the enactment by the Congress of the United States of the laws relating to the storing by distillers of whiskey in distillery bonded warehouses, it has been and still continues to be the usual and customary course of doing business by distillers of whiskey to sell, pledge and transfer whiskey deposited by them in their distillery bonded warehouses by the making, issuing and delivering by them of their warehouse receipts to the vendee or pledgee of the barrels of whiskey sold or pledged (describing and identifying in said warehouse receipts the barrels of whiskey sold or pledged, by their serial numbers, the date of their manufacture, the warehouse stamps thereon and the number of the bonded warehouse in which situated) and agreeing in said warehouse receipts to hold said barrels of whiskey sold or pledged for the account and subject to the order of the vendee or pledgee thereof, and in and by the sale and pledge as aforesaid of barrels of whiskey in their distillery bonded warehouses to obtain money and advances of money to enable them to carry on business as distillers, and during all of said time it has been and continues to be among distillers and bankers, brokers, dealers in whiskey and all persons having transactions with distillers an established custom and a commercial usage generally known and acted upon to regard and consider said warehouse receipts as giving constructive possession of the barrels of whiskey mentioned therein and as conveying

either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferable by indorsement either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in or possession of the barrels of whiskey mentioned in said warehouse receipts according to the rights of the original parties to the transaction and as constituting the owner of the distillery bonded warehouse issuing and delivering such warehouse receipts, as the bailee for the vendee or pledgee of the barrels of whiskey in said warehouse receipts mentioned; and this practice and method of doing business has obtained for more than forty years, and become an important part of the commercial system of the country, so that it is well understood and according to the usual course of business that the use and purpose of a warehouse receipt is to enable the owner of said distillery bonded warehouse to sell, pledge and transfer the title or the possession of the barrels of whiskey in his bonded warehouse for the purpose of raising money or securing advances thereon either by sale or pledge."

The trustees filed a general demurrer, which was sustained by the referee, and the order sustaining it was affirmed by the District Court (186 Fed. Rep. 997). The Circuit Court of Appeals reversed the District Court, and remanded the case for further proceedings (196 Fed. Rep. 5). Thereupon the District Court, in obedience to the mandate, overruled the demurrer and rendered final judgment in favor of Pattison, which was affirmed by the Court of Appeals; and an appeal to this court was then allowed.

Mr. Lee Warren James for appellants.

Mr. W. H. Mackoy, with whom *Mr. M. L. Buchwalter* was on the brief, for appellee.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The transactions in question, as between Rohrer, the bankrupt, and Pattison, the appellee, are not distinguishable from those that were under consideration in *Taney* v. *Penn Bank*, 232 U. S. 174. In that case the Distilling Company deposited as security for the loan made by the Bank certain gauger's certificates, in addition to warehouse receipts issued by itself. But the sole significance of the gauger's certificates was that they constituted evidence that the whiskies had been deposited in the storehouse in barrels marked and numbered as required by the act of Congress. Since it is admitted in the present case that the whiskies in question were in fact on storage, as mentioned in the warehouse receipts delivered by Rohrer to Pattison, and that the barrels were stamped, marked, and numbered as therein stated, the fact that no gauger's certificate was delivered to Pattison is of no present consequence.

The legal effect of such a transaction depends upon the local law. In *Taney* v. *Penn Bank*, upon finding that, by the law of Pennsylvania, the ordinary rule as to the effect of the retention of physical possession by the vendor of personal property, which he is capable of delivering to the vendee, is not applied by the courts of that State to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale is made, we held that, considering the situation of the property and the usages of the business, the transaction between the distiller and the bank was valid, and gave to the latter a lien upon the whiskey superior to that of the trustee in bankruptcy.

The question here presented is whether the local law of

Ohio so far differs from that of Pennsylvania that a different result should be reached. In behalf of appellants it is insisted that there is in Ohio a settled legislative policy with reference to the change of possession necessary for the creation of liens on personal property. Section 8560 of the General Code is cited (formerly § 4150, Rev. Stat.). It reads as follows:

"SEC. 8560. A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section."

It is insisted that this clearly and unmistakably establishes the doctrine that any transaction designed to give a security in personal property, if not accompanied by an actual change of possession, must be placed in the form of a chattel mortgage and filed for record, in order to be good as against creditors. It seems to us, however, that we should not fail to consider the well-recognized distinction between a chattel mortgage and a pledge. A mortgage of chattels imports a present conveyance of the legal title, subject to defeasance upon performance of an express condition subsequent, contained either in the same or in a separate instrument. It may or may not be accompanied by a delivery of possession. On the other hand, where title to the property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge, and not a mortgage.

There is no question that in Ohio, as elsewhere, a chattel mortgage, as well as a pledge, is valid between the parties, although not recorded. And, without the statute, it would

be good as against creditors, purchasers and mortgagees in good faith. The primary purpose of the act is to protect persons of these classes, who might otherwise sustain losses by relying upon the possession and apparent ownership of the chattels by the mortgagor. In the case of an ordinary pledge, there is no need of recording, since the pledgor at once parts with possession.

But what shall be said, when the transaction relates to personal property which is so situated that it is not within the power of the owner to deliver it to mortgagee or pledgee, and of which he has no such visible possession and apparent ownership as would probably be relied upon by creditors, purchasers, and mortgagees? Does § 8560, G. C., which declares that mortgages in such case shall be invalid against the designated third parties unless recorded, necessarily apply to transactions in the nature of a pledge, which are not mentioned in terms? The effect would be to greatly hamper, sometimes to prevent, transactions in the nature of a pledge, where only constructive possession of the property could be transferred. We cannot give to the section cited so extensive a meaning, in the absence of a decision by the state court adopting that construction. None such is referred to.

It is contended that a different rule exists in Ohio as to the delivery of possession in the case of pledges from that which obtains in the case of sales. Section 8619, G. C. (Rev. Stat., § 4197) is cited:

"SEC. 8619. When goods and chattels remain for five years in the possession of a person, or those claiming under him, to whom a pretended loan thereof has been made, they shall be the property of such person, unless a reservation of a right to them is made to the lender in writing, and the instrument recorded within six months after the loan is made, in the recorder's office of the county where one or both of the parties reside, or unless such instrument is filed as provided by law with respect to chattel mort-

gages. But if a loan of goods and chattels is made to an art museum association within this State, such reservation of a right to them may be so made and recorded at any time within five years from the date of the loan."

But in the Code, this section is made a part of Chapter 4, entitled "Statute of Frauds and Perjuries." It partakes also of the nature of a statute of limitations. We are unable to see anything in it to establish the asserted distinction between sales and pledges, and we are unable to find that any such force has been given to it by the courts of Ohio.

The cases to which particular reference is made are *Gibson* v. *Chillicothe Bank*, 11 Oh. St. 311; *Thorne* v. *Bank*, 37 Oh. St. 254; and *Hunt* v. *Bode, Assignee*, 66 Oh. St. 255. All are decisions by the Supreme Court of the State. In the *Gibson Case*, in an action of trespass for levying upon and detaining certain property by virtue of an execution against their bailees, plaintiffs, in order to prove their property and right of possession, gave in evidence certain warehouse receipts, reading in substance as follows: "Received, Chillicothe, November 13, 1852, of Messrs. Gibson, Stockwell & Co., and for their account, the following property, in good order, which we agree to hold irrevocably subject to their order, they having a lien thereon for the full cost of the same." (p. 312.) It was held that the legal effect of such a receipt was to pass the general property and right of possession to the holder, and that this effect was not impaired by the recital that the holder had a lien upon the property. The court, in its opinion, recognized that receipts of this kind, from long and general use in commerce and trade, had come to have a well-understood import among business men, which (as the court said) ought not to be confounded or perhaps even qualified by a strict construction of the literal and grammatical meaning of the words employed. And the court proceeded to say, (p. 317): "The receipts in this case are in

some particulars variant from each other; and yet we have no doubt they would all be recognized by commercial men, as of like import and equal validity as warehouse receipts. And if so, they as absolutely transfer the general property of the goods and chattels therein expressed, as would a bill of sale. They are a kind of instrument extensively used by commercial men, as the most convenient mode of transfer and constructive delivery of property, and facilitating the ready realization of the price of products by the producer remote from market. Public policy, as well as respect to good faith, requires that those like other instruments of commerce, should be so regarded in courts, as not to unjustly impair confidence in them elsewhere. And this view of the legal effect of such instruments, we think fully sustained by the authorities cited by counsel; and especially by the case of *Gibson* v. *Stevens*, 8 How. Rep. 384." It was therefore held that in spite of the recital that *Gibson, Stockwell & Company* had a "lien thereon for the full cost of the same," the warehouse receipts tended to prove that the plaintiffs had a general ownership in the property, and that the trial court erred in ruling otherwise. The citation of *Gibson* v. *Stevens* is significant, because in that case this court, in an opinion by Mr. Chief Justice Taney, recognized that where personal property is from its character or situation not capable of actual delivery, the delivery of a warehouse receipt or other evidence of title is sufficient to transfer the property and right of possession to another; and also because this decision was based in large part upon the usages of trade and commerce.

In *Thorne* v. *Bank, ubi supra*, it was held that an instrument in the form of a warehouse receipt, executed by a debtor to his creditor, upon property owned by the debtor, who was not a warehouseman, and made for the sole purpose of securing the creditor, was void as against other creditors where the property remained in the possession of the debtor. The court cited and relied upon Rev.

Stat., § 4150, above quoted, and in effect held that the attempt by the warehouse receipts to establish a lien upon the personal property was in conflict with the policy of that section, and therefore invalid as to a creditor. *Gibson* v. *Chillicothe Bank* was distinguished upon the ground that in that case the warehouse receipts were offered to show ownership, and not a mere agreement for securing an indebtedness. It will, however, be observed that in the *Thorne Case* the property in question was in the possession of the borrowers, and there was nothing in its character or situation to prevent an actual delivery of it to the lender.

In *Hunt* v. *Bode, Assignee, ubi supra*, which is the most recent case upon the subject to which our attention has been called, one Stothfang had delivered to a bank certain warehouse receipts for whiskey as collateral for a loan of money made to him by the bank, and thereafter undertook to make a second transfer or pledge to another party, subject to the claim of the Bank. A copy of this instrument was served upon the Bank, and it was notified to retain possession of the warehouse receipts pledged with it as collateral security for its claim against the pledgor, and after it was duly paid, the balance of the receipts were to be turned over to the second pledgee. The transaction was sustained, the court remarking, (p. 268): "Delivery of the property pledged is generally essential to a valid pledge, and it is equally true that to make a valid sale or transfer of any species or article of personal property, a delivery of the property sold or transferred is necessary. . . . But it does not follow that actual or physical delivery should always accompany the sale or transfer, and this is also true as to the pledging of choses in action or other kinds of personal property. The delivery in some cases may be symbolical, such as the handing over the writing which constitutes the title to the property, just as was done in this case, to secure the Atlas National Bank

for the money it had loaned to Stothfang. He delivered to the bank, not the one hundred and sixty-five barrels of whiskey, but the warehouse receipts for the same, which were its muniment of title and control of the property they represented. And when the pledgor desired to secure the payment of the note held against him by Dieckmann, he executed and delivered to him the transfer of all interest in the receipts which would remain, after the bank's claim should be satisfied. This transfer was not strictly a pledge, but an assignment and transfer of the stated interest in the warehouse receipts; but if it is desired that we call it a pledge, as has been done by counsel, we still observe, that constructive possession in the second pledgee would be sufficient, if the intent to deliver such possession is clearly apparent. It is the application of the familiar rule, that the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferree as the nature of the property and its situation will permit. In this case Stothfang owned a valuable equity in the warehouse receipts held by the bank, as their sale afterwards made manifest, and it was such interest in them that could be made the subject of sale and transfer, and even pledge, and certainly Stothfang gave to Dieckmann possession of all interest in and title to the receipts which would remain after the debt due the bank was satisfied. This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law."

We are unable to find in these decisions a recognition of the distinctions insisted upon by counsel for appellants. On the contrary, the Supreme Court of Ohio clearly recognizes the effectiveness of a symbolical delivery.

It is evident, also, that that court recognizes the force of a long continued commercial usage. And this lends peculiar significance to the conceded existence for more

than forty years of the custom and commercial usage set up by appellee in the amendment to his intervening petition, quoted in the prefatory statement. It is no answer to say that a trade custom or usage should not prevail against clear and unequivocal rules of law. This is a *petitio principii*. The question under consideration is whether certain portions of the written law are to be given by construction an effect different from that expressed in their language, on the ground that by authoritative decisions of the Supreme Court of the State the asserted policy has been found to be implied in them. Since it seems to us that neither the statutes nor the decisions go to the extent that is claimed for them by appellants, we may refer to the established custom as evidence of what has long been understood as the law; for, as this court held in *Gibson* v. *Stevens*, and as the Supreme Court of Ohio held in *Gibson* v. *Chillicothe Bank*, such usages are to be judicially recognized as a part of the law.

It results that by the local law the transactions in question, as between Rohrer and Pattison, had the effect of transferring to the latter the legal title and right to possession for the purposes of the agreement between them; and we think it is a matter of indifference whether the transaction be called a pledge, or an equitable pledge, or an equitable lien. The substance of the matter is for present purposes the same.

This being so, the superiority of Pattison's right over that of the trustee in bankruptcy is established by the decision of this court in *Taney* v. *Penn Bank*, 232 U. S. 174.

Decree affirmed.